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Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-773

WILLIAM L. CALLEY, JR.,

Petitioner,

versus

HOWARD H. CALLAWAY, SECRETARY OF THE ARMY; et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RECORD REFERENCES

The record of Petitioner's court-martial was filed as an exhibit with the District Court and is organized as follows:

Volume 1:

Book 1: Report of Article 32, Investigating Officer. *See* Art. 32, U.C.M.J., 10 U.S.C. § 832 (1970).

Books 2 and 3: Inspector General's Report of Investigation of My Lai incident.

Volume 2: Index

Volume 3: Transcripts. There are eleven books containing the 5,079 pages of transcript.

Volume 4: Prosecution Exhibits

Volume 5: Defense Exhibits

Volume 6: Court Exhibits.

Volume 7: Appellate Exhibits. This Volume contains 19 separate books.

Volume 8: Classified documents. By agreement of the parties this Volume is not being included in the record on appeal.

In this Petition, the transcript will be referenced: (R. . . . .). The appellate exhibits will be referenced: (App. Ex. . . . .). The defense exhibits will be referenced: (Def. Ex. . . . .). The prosecution exhibits will be referenced: (Pros. Ex. . . . .). The court exhibits will be referenced: (Ct. Ex. . . . .).

IN THE
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, William L. Calley, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, *en banc*, entered in these proceedings on the 10th day of September, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is filed separately herewith as

Appendix A. The opinion of the United States District Court for the Middle District of Georgia, 382 F. Supp. 650 (M.D. Ga. 1974), is filed separately herewith as Appendix B. The opinion of the United States Court of Military Appeals, 22 USCMA 534, 48 CMR 19 (1973) is filed separately herewith as Appendix C. The opinion of the United States Army Court of Military Review, 46 CMR 1131 (1973) is filed separately herewith as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 10, 1975. The judgment reversed the decision of the United States District Court granting a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. Whether the Petitioner was deprived of a fair trial and due process of law by prejudicial pretrial publicity.

II. Whether the Petitioner was denied confrontation, compulsory process, and due process of law by the refusal of a congressional subcommittee to honor subpoenas seeking testimony given before the committee.

III. Whether the arbitrary refusal of military courts to apply a federal discovery statute is an error of constitutional magnitude.

IV. Whether the Petitioner was denied his Sixth Amendment rights to confrontation and compulsory process and due process of law by the refusal of the military judge to order subpoenas for certain witnesses.

V. Whether the Petitioner was denied constitutionally required notice and was subjected to being twice placed in jeopardy for the same offense.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,
Article I, § 5, Cl. 3
Article I, § 8, Cl. 14
Amendment V
Amendment VI

Pertinent portions of said constitutional provisions are set forth in Appendix E hereof.

STATUTES INVOLVED

18 U.S.C. § 5
18 U.S.C. § 3500, Jencks Act
Article 46, U.C.M.J., 10 U.S.C. § 846
Article 118, U.C.M.J., 10 U.S.C. § 918

Pertinent portions of the statutory provisions are set forth in Appendix E.

REGULATORY PROVISIONS INVOLVED

Paragraph 115a, *Manual for Courts-Martial, United States*, 1969 (Rev. ed.) is set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner was charged on September 5, 1969, with the premeditated murder of not less than 102 Vietnamese civilians at My Lai (4) hamlet, Song My Village, Quang Ngai Province, Republic of South Vietnam. On March 29, 1971, a court-martial found Petitioner guilty of premeditated murder of not fewer than 22 Vietnamese civilians of undetermined age and sex and of assault with intent to commit murder on one individual. On March 31, 1971, Petitioner was sentenced to dismissal from service, forfeiture of all pay and allowances and confinement at hard labor for life. On August 20, 1971, the reviewing authority * approved the findings and reduced the sentence to confinement to twenty years. On February 16, 1973, the Army Court of Military Review affirmed the conviction and sentence. *United States v. Calley,* 46 CMR 1131 (1973). Petitioner then sought a review by the United States Court of Military Appeals on some thirty-two errors. The United States Court of Military Appeals granted a petition for review as to only three of the assignments of error and, with the Chief Judge dissenting, affirmed the decision of the Court of Military Review. *United States v. Calley,* 22 USCMA 534, 48 CMR 19 (1973). The Secretary of the Army reviewed the sentence under Article 71b, U.C.M.J., 10

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* Contrary to the majority opinion of the Fifth Circuit Court of Appeals, the convening authority was disqualified from reviewing the findings and sentence and this was handled by a higher reviewing authority.

U.S.C. § 871 (b), approved the same, but in a separate clemency action commuted the confinement portion of the sentence to ten years. On May 3, 1974, the President of the United States stated that he would take no further action in the matter. On February 11, 1974, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Georgia. On September 25, 1974, the District Court granted the Petition for Writ of Habeas Corpus and ordered Petitioner's immediate release. Respondents appealed and Petitioner cross-appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals upheld the release of Petitioner pending the appeal in an *en banc* decision and ordered *en banc* consideration of the case. On September 10, 1975, the Court of Appeals, sitting *en banc,* reversed the District Court's order granting a writ of habeas corpus and reinstated the judgment of the court-martial, with five judges dissenting. The case is before this Honorable Court on a Petition for Writ of Certiorari from that judgment.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S FINDING THAT PETITIONER HAD BEEN DEPRIVED OF A FAIR TRIAL AND DUE PROCESS OF LAW BY PREJUDICIAL PRETRIAL PUBLICITY.

This Honorable Court long ago affirmed the principle that an accused's guilt or innocence should be determined based *solely* on facts elicited at trial and not from information gleaned from the news media. It is respectfully submitted that the Court of Appeals' opinion below marks an unprecedented abrogation of that principle.

This Court stated its views concerning the general principles governing cases involving prejudicial publicity in *Mattox v. United States*, 146 U.S. 140 (1892). The jury in *Mattox* had not reached a verdict when they were exposed to newspaper articles damaging to the defendant. In that setting, the Court stated:

> *It is vital in capital cases*[1] *that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of*

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(1) Petitioner's case was referred to trial as a capital case.

> *justice has been interfered with be tolerated.*
>
> . . . .
>
> *. . .(T)he reading of newspapers, containing imperfect reports of the trial, or objectionable matter in the form of editorial comments or otherwise, have been held fatal to verdicts. 146 U.S. 149, 150.*

Through the years, the doctrine of "inherent prejudice" has developed which is exemplified by *Griffin v. United States*, 295 F. 437 (3d. Cir. 1924). The newspapers published statements which included the fact that the defendant had confessed. Griffin's conviction was reversed even though it was argued that there was no direct evidence that the jury read the newspaper reports. The Court of Appeals noted that the articles appeared on the front pages and that counsel's motion stated that jurors were seen reading the material. The Court then stated:

> *Our opinion on this question was well expressed by Judge Acheson in the case of Meyer et al v. Cadwalader (C. C.) 49 Fed. 32. The facts of that case were strikingly similar to those in the case at bar. He said.*
>
> *'It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read*

these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it.' 295 F. at 440.

Six years later, the District Court for the Southern District of New York, rejected the idea that jurors statements of nonprejudice need be always accepted in *United States v. Montgomery et al,* 42 F. 2d 254 (S.D.-N.Y. 1930). The Court reasoned that jurors, even with the best of intentions, would not be able to wholly erase from their minds the salient facts contained in the publicized articles. Further, the Court observed that the subconscious recall of the facts read might cause the jurors to disregard underlying requirements of a criminal case, such as resolution of doubt.

In *Marshall v. United States,*[2] 360 U.S. 310 (1959), this Court affirmed the concept that the answers of jurors need not be accepted. Marshall was convicted of unlawfully dispensing drugs without a prescription. The government proposed to prove that he had previously practiced medicine without a license. Such evidence was ruled inadmissible but during trial two newspapers published accounts reciting that Marshall had practiced medicine without a license and had been

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(2) While **Marshall** was an exercise of the "supervisory power" over federal courts, **Murphy v. Florida,** U.S. , 44 L. Ed 2d 589, 593 (1975), the principles stated therein should be applicable **sub judice** since there are no compelling military exigencies requiring otherwise. (Appendix A at 7708).

convicted of forgery. Seven jurors who had seen all or portions of the news articles swore that they would not be influenced by them, that they could decide the case only upon the evidence of record, and that they felt no prejudice against Marshall as a result of the articles. Despite these assurances which under earlier rulings would have been sufficient to show impartiality, the case was reversed and sent back for a new trial. This Court, in reversing the conviction, held that, in spite of the jurors' declarations of non-prejudice, noninfluence, and their assurances that they would decide the case only on the evidence of record, the exposure of the jurors to information inadmissible as evidence was almost certain to prejudice the defendant. 360 U.S. at 312, 313.

In *Janko v. United States,* 366 U.S. 716 (1961), this Court reversed the lower court in a *per curiam* opinion. The Court was so convinced that the defendant's right to a fair trial was prejudiced that counsel was not extended an opportunity to argue. Janko was found guilty of willfully attempting to evade income tax. A mistrial was granted when four members of the jury admitted contact with prejudicial newspaper articles. During the second trial, a local newspaper reported that Janko was a former employee of a racketeer and a former convict who had been found guilty in the same case but was granted a new trial. After the verdict the jurors were asked *en masse* whether they were influenced by anything other than testimony in the courtroom during the trial and none responded. This Court nevertheless reversed Janko's conviction. See *Janko v. United States,* 291 F. 2d 156 (8th Cir. 1960).

In *Irvin v. Dowd*, 366 U.S. 717 (1961), six murders were committed near Evansville, Indiana. Shortly after defendant's arrest, police officers issued heavily publicized press releases stating that the defendant had confessed to the murders. The Defendant sought a change of venue which was granted but only to the adjoining county. He then sought a further change of venue because of widespread and inflammatory publicity. The second change of venue was denied. After the conviction was affirmed by the Indiana Supreme Court, defendant instituted a *habeas corpus* proceeding. This Honorable Court, after reciting the general rule that it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court, stated that this rule does not close inquiry as to whether, in a given case, the application of the rule deprives a defendant of due process of law. 366 U.S. at 723. As a result of the barrage of publicity eight jurors thought the defendant to be guilty. The Court found inherent prejudice despite the jurors' claims of fairness and impartiality. The Court stated:

> *It is true that the presiding judge personally examined those members of the jury panel whom Petitioner, having no more preemptory challenges, insisted should be excused for cause, and that each indicated that notwithstanding his opinion he could render an impartial verdict. But as Chief Justice Hughes observed in United States v. Wood, 299 U.S. 123, 145, 146, 81 L ed 78, 87-89, 57 S. Ct. 177: 'Impartiality is not a technical conception. It is a state of mind. For*

> *the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.' 366 U.S. at 724, 725.*

In addition, Mr. Justice Clark made this sage observation, "No doubt each juror was sincere when he said he would be fair and impartial to the petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." 366 U.S. at 728.[3]

In *Rideau v. Louisiana*, 373 U.S. 723 (1963), reversal was ordered without a review of the record for actual prejudice. The day following his arrest, Rideau was interviewed concerning a robbery and murder and admitted guilt. The interview was televised. Rideau moved for a change of venue which was denied. This Court did not review the transcript of the examination of the jurors. The dissenting justices, taking a view similar to that taken by the Court of Appeals in this case, complained because the record did not establish a nexus between the televised interview and defen-

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(3) The Court of Appeals alleged a distinction between Petitioner's case and Irvin by noting that eight of the jurors in Irvin believed the defendant guilty while no sitting juror stated this in Calley. This is a distinction without a difference, however, for one juror found the key prosecution witness credible. In addition, there is no such distinction between Marshall or Janko, both supra, and the case sub judice. Indeed, the publicity in those cases pales insignificant when compared with that faced by Petitioner.

dant's guilt.[4] The reasoning of the dissenters was rejected:

> *For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle . . . in a very real sense was Rideau's trial — at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality. 373 U.S. at 726.*

Turner v. Louisiana, 379 U.S. 466 (1965), involved a situation where two bailiffs were shepherds of the jury and were called as prosecution witnesses. The defense charged that they influenced the jury, but in a subsequent hearing, they testified that they had not talked to the jurors about the case. In spite of the fact that the defendant could not establish any conversations or direct influences, this Court reversed the conviction, stating that a jury's verdict must be based solely upon the evidence at trial and that this goes to "the fundamental integrity of all that is embraced in the

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(4) However, contrary to the Court of Appeals (See Appendix B 683-687), this nexus was shown herein.

constitutional concept of trial by jury". The Court further recognized that a jury trial implies that:

> *"(E)vidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury. 379 U.S. at 472, 473.*

In *Estes v. Texas*, 381 U.S. 532 (1965), the defendant was convicted for swindling and the conviction was reversed as a result of televising of the two day preliminary hearing and part of the trial. Texas argued that, since there was "no isolatable prejudice," the conviction obtained was valid. This Court, noting that it had previously found instances where a showing of actual prejudice was not a "prerequisite to reversal," found that *Estes* was a case where there was involved "such a probability that prejudice will result," a finding of an inherent denial of due process was required. The Court then quoted with approval a statement in *In re Murchison*, 349 U.S. 133 (1955):

> *A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . (T)o perform its high function in*

the best way "justice must satisfy the appearance of justice." 381 U.S. at 542, 543.

As in *Rideau* and *Turner*, both *supra*, the Court in *Estes* did not stop to consider prejudice because it was inherent in the methods employed.

> *In this case it is even more clear that such a rule must be applied. In Rideau, Irvin and Stroble, the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings . . . Likewise in this case the application of this principle (inherent prejudice) is especially appropriate. Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced . . . Such untoward circumstances as were found in these cases are inherently bad and prejudice to the accused was presumed. 381 U.S. at 544.*

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a murder case, this Court recited in detail the massive buildup of publicity culminating in front page editorials demanding the arrest of the defendant. The publicity grew in intensity, and by the date of conviction, filled five volumes. At the trial, representatives of television, newspapers, and radio stations completely filled the

courtroom except for a few seats in the last row. The defendant, attorneys, witnesses and jurors were constantly exposed to the news media. In *Sheppard*, the trial judge stated that he could not control the generation of publicity. 384 U.S. at 348. This Court, observing that "legal trials are not like elections, to be won through the use of meeting hall, the radio, and the newspaper," once again rejected the necessity of proving identifiable prejudice and found the procedures inherently lacking in due process. 384 U.S. at 350, 352.

It is submitted that the following constitutional standards may be gleaned from the above cited cases. (1) Legal trials are not elections, to be won through the use of the meeting hall, television, radio, books, magazines and newspapers. Legal trials are to determine *guilt* or *innocence*, not *popularity*. (2) Pretrial publicity developed outside the courtroom must not be allowed to enter the deliberations inside the courtroom. Trial courts are required to take steps and must be able to protect the individual from the prejudicial effect of these out-of-court events and statements. (3) Published statements, which draw factual and/or legal conclusions concerning the outcome of a case or which determine as being factually proven elements of a crime charged, are inherently prejudicial and require reversal if the finders of fact are exposed thereto. (4) Where such inherently prejudicial communications or outside influences are so pervasive as to leave no question that the prospective jurors or the actual jury had seen, heard or read them, there is no necessity for "direct evidence to show that the jurors were actually exposed to the com-

munications." (5) The protestations of jurors that they would not be influenced by such material is not to be accepted where the exposure is proven and the coverage is pervasive. (6) Where the outside communications contained information of a character which would not be admissible as evidence at the trial (such as hearsay statements), the prejudice to the defendant is to be presumed as such information has not been tempered by protective procedures inherent in a judicial proceeding. (7) Statements and information that tend to prove guilt of the defendant are inherently prejudicial and if the publicity thereof is pervasive, actual prejudice is not required; general prejudice will be presumed. (8) The trial judge must have and use sufficient powers to protect the individual accused from the prejudice.

Petitioner respectfully submits that when these constitutional standards are applied to the case herein, the inevitable conclusion must be that he was deprived of due process of law. The Court of Appeals' opinion failed to recognize these constitutional requirements and, as a result, is a marked departure from the law as established by this Honorable Court. Thus, this case is a proper one for the granting of the Writ.

The Court of Appeals decision is constitutionally defective in several regards. Initially, the Court erroneously equated the District Court's opinion with being suggestive of a rule that "prominence brings prejudice." (Appendix A at 7709-7710). This conclusion completely ignored the specific decision of the District Court below:

This opinion of the Court should not be

construed as holding that if an individual who is charged with offenses achieves certain sufficient notoriety as a result of his alleged acts the charges should be dismissed. The guidelines enunciated by the Supreme Court in the Sheppard case contained the remedies for pre-trial publicity problems created by the great majority of cases. Unfortunately, the court-martial system could not and can not effectively invoke some of these guidelines. What the Court holds is that an individual should not be required to stand trial by his government without protection from the publication of prosecution "testimony" against him in advance of trial and the sale of evidence to the highest bidder to be used against him; that every citizen of this nation, no matter how notorious, has a right to be tried in a court, whether military or civilian, that can protect him against prejudicial coverage by the news media; that an accused should not be tried by a court which must announce that it is powerless to enforce its own orders; that a court or a system within the constitutional framework of our nation that is so sterile that it can not protect the accused from such publicity denies him due process of law; that the accused should not be tried by jurors who are members of an organization which is in some respects itself on trial; that if investigation by the press and public comment by government officials is accorded such high value that it must prevail, then the exercise of those rights should not be enjoyed at

the expense of the accused's right to a fair trial. (Appendix B at 691-692).

Moreover, the Court of Appeals, by citing the fact that there was "some" publicity "favorable" to Petitioner, that a "good deal of the extensive publicity" were "objective statements of the facts known", and that there was "considerable sympathy" for Petitioner as evidenced by "polls and figures" committed precisely the error recognized by Mr. Justice Black in *Bridges v. California*, 314 U.S. 252, 271 (1941) and reiterated by the Court in *Sheppard:*

> *. . . (L)egal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper. 384 U.S. at 350.*

The Court of Appeals' position is equivalent to allowing guilt to be determined by popular election with the concommittant influence of the press. Jurors would thus be left to determine guilt or innocence after receiving supportive propaganda from each side. As Mr. Justice Frankfurter stated:

> *One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.*
>
> . . . . .
>
> *How can fallible men and women reach a disinterested verdict based exclusively on what*

> *they hear in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process in its most rudimentary conception, Irvin v. Dowd, 366 U.S. at 729-730. (Frankfurter, J., concurring.)*

The Court of Appeals ignored the exhaustive analysis of the reportage by the District Court below. (Compare Appendix A at 7710-7711 with Appendix B at 657-683).[5] For the sake of brevity and clarity, Petitioner does not recap the publicity but urges this Honorable Court to review the just referenced portions of the District Court's opinion. Suffice it to say that never before in American history has an accused encountered such intense and continuous prejudicial publicity as did the Petitioner. The publicity took every imaginable form including, but not limited to, newspapers, radio, television, periodicals, and books. Self-proclaimed surviving witnesses were interviewed. These interviews involved language interpretations as to what the witnesses actually said as well as journalistic interpretations as to what was meant by their statements. *Every critical witness who testified at the trial against the Petitioner was interviewed and each story was widely publicized.*

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(5) It should be pointed out that neither the opinion of the Army Court of Military Review nor that of the Court of Military Appeals made any attempt at a detailed analysis of the publicity. Only the District Court has reached a conclusion based upon citations to specific references in the record.

The Court of Appeals failed to recognize that policy statements by high-ranking officials are more apt to cause a psychological denial of prejudice and to influence the deliberations of military jurors — — members of a hierarchial system.[6] The Court ignored the fact that the source of much of the damaging publicity came from the executive branch of the government — the prosecutorial branch.[7] The President, the Secretary of Defense, the Secretary of the Army, the Secretary of State, and the Chief of Staff of the Army, along with prominent members of Congress, made heavily publicized comments indicating that those in power wished someone convicted and punished for My Lai. From the emphasis by the media that the Petitioner was the "principal figure" involved, that someone was the Petitioner.

The Circuit Court's reliance upon *Murphy v. Florida*, U.S. , 95 S. Ct. , 44 L. Ed 2d 589, (June 16, 1975) and *Beck v. Washington*, 369 U.S. 541 (1962) is misplaced. Unlike Petitioner's case, the publicity in *Beck* was "often relegated to the inner pages." In addition, the publicity was "neither intensive or extensive" 369 U.S. at 111. There can be little question as to the extensive and intensive nature of the publicity in Petitioner's case. Similarly, in *Murphy*, there were only a few articles as opposed to the voluminous publicity in Petitioner's case. The Court of

(6) Quinn, 35 St. John's L. Rev. 225 (1961). The author of this article was a judge on the Court of Military Appeals. See also Irvin v. Dowd, 366 U.S. at 728.

(7) Every juror admitted exposure to televisions, books, magazines, radio, periodicals, all of which carried these statements. (Appendix B at 684-685.)

Appeals took note of the "factual" nature of the publicity in *Murphy* and observed that part of the reportage here was factual. It should be noted, however, that witnesses against Murphy did not have their testimony shown on nationwide television and reported in nationwide newspapers nor were the jurors exposed to "testimony" prior to trial. The voluminous nature of the publicity and the juror exposure thereto in Petitioner's case distinguishes this case from *Murphy* and *Beck*.[8]

The Court of Appeals further erred in its statement:

> *It is not disputed that the military judge used most of the means suggested by Sheppard v. Maxwell, to ameliorate potential prejudice stemming from publicity. (Appendix A at 7717.)*

This statement directly conflicts with the military judge's own admission that "as a matter of law" he did not possess the "pretrial powers of contempt or any other judicial remedy to enforce the mandate of the Supreme Court as that Court provided in *Sheppard v. Maxwell*, 384 U.S. 333." (App. Ex. 5) The Court failed to recognize that which the military judge knew. Any attempt to follow the *Sheppard* mandate was thwarted by his lack of power to enforce orders to prospective witnesses, by the fact that only one of the jurors received cautionary instructions regarding exposure in time to be effective, and by the fact that much of the

(8) Even the Court of Military Appeals conceded the massive nature of the publicity and the exposure of the jurors thereto.

damage occurred before a military judge even existed.

During the critical period from September 5, 1969 until November 25, 1969, there was no military judge. Any analysis of the publicity issue involved herein must begin with this beginning period of the dissemination of the prejudicial publicity. A court-martial is an *ad hoc* proceeding and there is no military judge until the case is referred to trial by the convening authority. Unlike the federal and state civilian systems of justice, there is no continuously sitting judge with judicial power to protect the individual until such time as the case is referred to trial. Therefore, even though charges were preferred on September 5, 1969, and the military system had begun the processing of Petitioner's case, there was no one to whom the Petitioner could turn for protection of his individual rights to a fair and impartial trial.[9]

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(9) As the District Court stated in its opinion below:

"In the military system there is no continuously sitting judicial officer who may act to protect the rights of the individual accused. Unlike the civilian system, in the military system there is no judge with judicial powers to protect the individual until the case is **referred to** trial by court-martial. Under the Uniform Code of Military Justice there is **no court** until a convening authority convenes the court-martial and details a military judge. Before an accused's case is **referred** to trial there must be a preferral of charges and investigation. The investigating officer makes a recommendation as to the disposition of the case. Only after this recommendation and review by the convening authority's legal officer does the convening authority **refer** the case to a general court-martial, and **only then** is a court of special jurisdiction created . . . Thus, a situation is created where an individual stands accused of a crime but there exists no judicial officer to whom he may turn for protection of his right to a fair trial until a later time when the charges are referred to trial by court-martial. (Appendix B at 657-658.)

This salient fact distinguishes Petitioner's case from **United States v. Ehrlichman**, 389 F. Supp. 95 (D.D.C. 1974).

The Court of Appeals ignored this salient defect in the military system.

Prior to November 25, 1969, and the existence of a military judge, the following had taken place: (1) Every form of news service in the world had deluged its hearers, viewers and readers with extensive and intensive coverage of the Petitioner's case. (2) Petitioner had been described as a "mass murderer" and a "ghoul." (3) Hearsay interviews with people who were not even witnesses to the events themselves were broadcast.[10] These interviews pointed a finger at the Petitioner. (4) Petitioner was characterized as being the one responsible for "murder", "slaughter" and "massacre". (5) Alleged eye witnesses to the "massacre" were interviewed by reporters through interpreters concerning the facts of the incident and Petitioner's name was "freely bandied about" in these interviews. (6) Key witnesses who later were to appear at the trial of the Petitioner *sold* their "testimony" to the media and one sold photographs to national magazines alleged to represent the "dead bodies" at My Lai for which, according to these accounts, the Petitioner was responsible. More than fifty thousand dollars ($50,000.00) was paid to this witness for his photographs. (7) Editorial comment condemned the incident and the Petitioner, and stated factual and legal conclusions. (8) The most damaging witnesses appeared on national television and rehearsed what their testimony would be.[11] (9) The television networks stated that the "free press - fair trial issue (raised by its critics) does not apply because Lieutenant Calley

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(10) See **Marshall** and **Turner**, both **supra**.
(11) See **Rideau, Estes, Irvin**, all **supra**.

will be tried, not by a civilian jury but by a military court." Thus, they continued their reportage unabated. Newspapers, magazines and other forms of periodicals carried hearsay stories of alleged eye witnesses, both Vietnamese and American, and "reported, reviewed, rehashed, resummarized, recapsulated and repeated everything that had come out in the previous week by way of gossip, and always the name *Calley* was the center of attention." (Appendix B, 658-665.) (App. Exs. 7a, 7b, 7c; 13-19; 26; 39-45; 63-68k; 70-76; 111; 116; 118; 123.)

The Court of Appeals also failed to recognize that the orders to prospective witnesses issued by the military judge were indeed "(m)ore honour'd in the breach than in the observance."[12] The military judge issued protective orders, fully realizing that he

(12) Shakespeare, **Hamlet**, cited by the District Court below. (Appendix B at 666). As the District Court noted in its opinion, the military judge excepted Captain Ernest Medina from his orders prohibiting the giving of interviews by potential witnesses to the news media and permitted Captain Medina to "hold a news conference in the Pentagon" on December 4, 1969. (Appendix B at 673.) The military judge realized that a main contention of the defense would be that the Petitioner was carrying out Medina's orders. However, he allowed Captain Medina to broadcast his denial of issuing such orders nationwide and worldwide at a news conference. When confronted by the defense, the military judge explained that he had excepted Medina from his order "because I didn't think he would grant an interview," and thereafter ordered Medina to stop talking. It is quite evident from the fact that the jurors admitted seeing Captain Medina on television and that one of them considered him a "credible" and "straight-forward" witness, the military judge's failure to curtail his interview operated to the prejudice of the Petitioner. In addition, as was noted in the District Court's opinion, the military judge recognized that witnesses were selling their testimony and were willfully violating his orders. For example, Haeberle appeared on the Today Show three days after the military judge issued his orders.

did not have the contempt powers with which to enforce the orders. These orders were issued on November 25, 1969. (App. Exs. 1, 3a, 3b-3k, 12, 37, 190, 191, 231.) Three days later, in another pre-trial hearing, the military judge recognized evidence before him of "willful violations of the order which the Court had issued to witnesses." (Appendix B at 666.) On December 8, 1969, further evidence showing more interviews with witnesses on television, on radio, and in the newspapers was presented to the military judge. In addition, the defense introduced exhibits showing public statements made by the President and other high-ranking government officials and the military judge acknowledged that he could not stop that. (R. 32; App. Ex. 5). Again, on December 16, 1969, the military judge determined that other witnesses were willfully violating his orders, announced that he was helpless to protect the Petitioner, and instructed the trial counsel (prosecutor) to notify the Justice Department of the violations and to seek their assistance in enforcing his orders to the prospective witnesses.[13] (R. 30, 2666-2668; App. Ex. 24). Again, on January 20, 1970, the military judge acknowledged that his orders were being willfully violated. (R. 93). The Court of Appeals' decision ignored this total lack of power on the part of the military judge to enforce his orders. In order for the military judge's efforts to follow the *Sheppard* mandate, he must have the power to enforce his orders to prospective witnesses.[14] He did not.

The Court of Appeals erroneously criticized the

(Footnote 13 and 14 on Page 26)

District Court's statement that the military judge "could not control the witnesses nor the news media" and equates this statement with suggesting that a "gag" rule should have been applied to the news media. While the District Court clearly found, and rightfully so, constitutional error in the inability of the military judge to enforce his own orders to witnesses, the Court did not advocate a "gag" rule. Indeed, the opposite:

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(13) As was recognized by the Court of Military Review and by the District Court, the Department of Justice did not even acknowledge receipt of the Prosecutor's notification. Indeed, as was recognized by the District Court, the continuous and willful violation of the military judge's orders occurred throughout the entire period of more than one year before the trial actually began. The military judge repeatedly recognized his own lack of power. (R. 32; 406-427; 2666-2668). On November 25, 1969, the military judge found that the news media had so widely publicized the alleged events, witnesses and the Petitioner that there was a "clear and present danger" to the constitutional right of the Petitioner to a fair and just trial and to his constitutional privilege of being afforded due process of law. (App. Ex. 5). The military judge directed the trial and defense counsel to seek appropriate relief from a United States District, Circuit, or Supreme Court of the United States or in the United States Court of Military Appeals (App. Ex. 5). A petition was filed before the **Court of Military Appeals but was denied on the basis that the trial judge could protect his appellant. United States v. Calley,** 19 USCMA 96, 41 CMR 96 (1969).

The Petitioner went into the United States District Court for the District of Columbia and into the United States District Court for the Northern District of Georgia in an effort to protect his constitutional rights but he was denied relief in these forums substantially on the grounds that he **had not exhausted his military remedies.**

(14) The District Court discussed this situation and the lack of contempt power on the part of the military judge in its opinion. In addition, the Court pointed up the fact that the Justice Department was most willing to aid the prosecution in obtaining the presence of civilian witnesses against Petitioner but refused to take any steps to protect the Petitioner. (Appendix B 667, footnote 8.) Military judges have no contempt powers over individuals outside the courtroom. Articles 47 and 48, U.C.M.J., 10 U.S.C. §§ 847 and 848.

> ***In balancing the right of the press to disseminate the news and the right of the accused to have his trial conducted in an atmosphere free from the prejudicial effect of such news coverage, we deal with two separate guarantees of the Constitution which are in direct conflict. Neither guarantee is predominant over the other. Rather, these guarantees must be viewed separately and they both must be observed. Where the guarantees conflict, neither may give way. The right of a free press, embodied in the First Amendment, is guaranteed. The individual's right to a fair trial guaranteed by the Fifth Amendment's due process clause and in the other individual provisions of the Bill of Rights is absolute. This opinion does not denigrate the right of the press to publish news matter, but it does hold inviolate the individual's right to a fair trial. Any other decision would in the Court's opinion so emasculate the individual's right to a trial free from bias and prejudice as a result of outside influences that the due process clause would become nothing more than idle words availing nothing. This opinion simply places the burden on the government and the military system to protect the individual rights of the person criminally accused. (Appendix B at 692.)***

The Court of Appeals similarly failed to recognize that cautionary instructions given to the military jurors were not effective as to five of the six jurors because the instructions were not received until after exposure to

more than one year of continuous prejudicial publicity. The military judge's orders to court members (jurors) to refrain from exposure to press and media were not applicable to any juror, with the exception of Colonel Ford, until on or after November 13, 1970. The other five court members were not appointed until that date. (R. 775; See also CMCO No. 109, 110). Thus, from September 5, 1969, until November 13, 1970, none of these jurors were instructed to avoid exposure to the prejudicial publicity surrounding the Petitioner's case and all admitted their exposure thereto for more than one year. As was conceded by the prosecution, the publicity to which these jurors were exposed was "repeated and unprecedented newspaper, television, radio and periodical accounts and pictures purported to represent evidentiary accounts of alleged witnesses to the case . . . representing a clear and present danger to the constitutional and inherent rights of 1st Lieutenant William Calley, Jr. to a fair trial." (Joint motion filed by the defense and the government on November 25, 1969.) The District Court recognized this salient factor while the Court of Appeals and the military courts ignored it. (Appendix B at 682.)

Prior to the court-martial, the press and media had disseminated testimony, opinions and judgments to which the military jurors were admittedly exposed and which stated, directly and indirectly: (1) That people had been shot at My Lai; (2) That the people were innocent civilians; (3) That as a result of being shot, the civilians were dead; (4) That the Petitioner had personally shot certain of these civilians; (5) That the Petitioner had ordered other civilians shot; (6) That the

company commander did not give the Petitioner an order to so act; (7) That there was no justification for Petitioner's acts; (8) That there was no excuse for Petitioner's acts; (9) That the incident had shamed the nation; (10) That the President of the United States and officials of the Defense Department had condemned the incident; (11) That the Army's image was being tarnished by the incident; (12) That the "principal figure" in the incident was Petitioner; (13) That the Army's image should be restored and any stain on the reputation of those who had fought valiantly and honorably in Vietnam should be removed; and (14) That the persons responsible for this sad state of affairs were to be prosecuted by court-martial. Nowhere in the Court of Appeals' opinion are these conditions considered.

As in *Rideau*, much of the prejudice here occurred before the trial began. However, here it was worse for there was no judicial officer to protect the accused. The judge in *Rideau* did not give a stamp of approval to the televised interview in that case. Nevertheless, the prejudice occurred. Moreover, a change of venue in the present case would not have cured the problems as it would have in *Rideau* and *Irvin*. The coverage here was world-wide and all pervasive.

As this Honorable Court observed in *Estes*, concerning *Rideau*, *Irvin* and *Stroble*, the pretrial publicity happened outside the courtroom and could not be curtailed. "The only recourse other than reversal was by contempt proceedings." 381 U.S. at 544. Here the publicity occurred outside the courtroom and, by the military judge's own admission, could not be curtailed.

Thus, the only recourse left was either reversal or contempt proceedings. The military judge admitted he had no power with regard to the latter; therefore, reversal is the required remedy.

Further, contrary to the opinion of the Court of Appeals, the cases discussed *supra*, teach that where the jurors admit exposure to prejudicial publicity of the nature of that herein,[15] prejudice will be presumed in spite of juror assertions that they will not be influenced. *Marshall v. United States, supra; Janko v. United States, supra; Irvin v. Dowd, supra.* In *Griffin, supra,* and *Janko, supra,* it mattered not that the jurors never admitted to reading the newspaper articles. As in *Irvin,* the saturation by press, radio, and television in this case for months preceding the trial so prejudiced the case that a denial of due process, in its most rudimentary conception, occurred.

At the outset of the court-martial, the defense presented a two-part motion requesting dismissal of the charges because of prejudicial pretrial publicity. The first portion of the motion contended that the prejudice from publicity precluded the Petitioner from ever receiving a fair trial. The military judge denied this motion before *voir dire*. The second part of the motion contended that the publicity so tainted the prospective jurors that the Petitioner could not receive a fair trial. The military judge withheld his ruling on this motion until after the *voir dire* and, upon completion of the

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(15) As the Court of Military Review and the District Court found, every single member of the panel admitted exposure. **United States v. Calley,** 46 CMR at 1146-1148. (Appendix B 684-685.)

voir dire, he denied the second part of the motion, accepting as valid the protestations of the prospective jurors that their judgment would not be affected by the publicity. (Appendix B at 683-684.) Thus, the position taken by the Court of Appeals that the defense ameliorated or purged the prejudice by the simple expedient of examining the jurors on *voir dire* ignores the fact that there was a continuous motion which was not ruled upon until after *voir dire* which challenged each and every one of the prospective jurors on the basis of prejudicial pretrial publicity.[16] Further, this Court has refused to even consider the *voir dire* or to test for actual prejudice in like instances. See *Rideau, Janko, Turner,* all *supra.*

Every court member who ultimately sat in judgment of the Petitioner had in-depth prior knowledge of the alleged facts, circumstances and participants involved in the case. Coloniel Ford, stated that, prior to the military judge's order to refrain from such, he had *read news articles concerning the trial* (R. 568.) After the order, he admitted *exposure to*

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(16) It is noted, parenthetically, that the defense went into three higher courts to seek relief on this issue. To argue that, in spite of these repeated challenges, motions and efforts to obtain relief, the defense waived the issue by not effecting a rote recantation of the challenge after each and every prospective juror borders on the absurd and ignores the facts. The Court of Appeals failed to recognize this continuing challenge to the court members. Further, the Court erroneously assumed that since the defense sought to have Vietnam combat veterans on the court that the jurors were acceptable since they were combat veterans. Wanting a juror familiar with combat is not equivalent to wanting one who has prior knowledge of the facts of the case as reported by the media. (Appendix A at 7711-7717.)

newspapers and television broadcasts concerning the incident. A cursory glance at the immense morass of clippings and television reports leads to the inescapable conclusion that he could not have helped being influenced by the materials which labeled the Petitioner as a ghoul who had wantonly "massacred" hundreds of "innocent civilians". Ford stated that he *had seen pictures of the alleged killings and of Calley,* which were, in and of themselves, so prejudicial as to require his removal. He had a *working knowledge of the alleged participants* and named specifically *Lieutenant Calley, Captain Medina, Sergeant Mitchell* and *Meadlo. Furthermore, he had read articles in which the hearsay statements of witnesses had appeared.* As this Court recognized in *Marshall,* 360 U.S. 313, there is clearly prejudice where a juror reads such material held to be inadmissible as evidence.

Captain Salem had read newspapers, heard and seen radio and television reports concerning the case from the very beginning up to the time of the trial. He candidly admitted that a witness, during the course of the trial, might say something which would trigger his memory as to something he had previously read and that this might subconsciously affect him in his decision in the case. (R. 764). This is precisely what the above cited cases warn against.

Major McIntosh had read books,[17] magazine

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(17) The books were those by Hersch and Hammer which personally denigrated Petitioner. **Life Magazine** carried the most prejudicial and inflammatory pictures of the alleged incident and pointed in no uncertain terms, to Petitioner's guilt. (Appendix B at 678-681.)

and newspaper articles, including *Life Magazine,* prior to the trial. Not only did he feel no sympathy for Lieutenant Calley (R. 779), he was "impressed" by the "straightforward" answers of Captain Medina on television and thought that Medina would make a "credible" witness. Thus, he had, prior to trial, made a determination as to credibility that ultimately proved to be prejudicial to Petitioner. McIntosh had discussed the case with his peers and remembered the Secretary of Defense's statement concerning My Lai. (R. 786).

The exposure of the remaining three jurors, was similar to the above. Major Bierbaum had read newspaper articles and had listened to television and radio reports and had discussed the case with fellow officers at the infantry school. (R. 816). Major Kindard read accounts of the case in books, newspapers and magazines from the very beginning up until a few days before trial. (R. 834). He remembered hearing about Medina on television and remembered the statements made by the President that a "massacre" had taken place (R. 846). Captain Brown had heard radio and television reports and read articles, including those in *Life Magazine* (R. 860, 861). He repeatedly used the term "massacre" with regard to the incident. (R. 863).

The military judge's cautionary instructions to the jurors did not cure the evil. Not only were they too late to be effectual but their curative effect is rebutted succinctly by Mr. Justice Jackson's observation in *Krulewitch v. United States,* 336, U.S. 440 (1949):

> *The naive assumption that prejudicial effects can be overcome by instructions to the jury*

. . . all practicing lawyers know to be unmitigated fiction, Id. at 453.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955); *Turner v. Louisiana*, 379 U.S. 466 (1965). This case points up the wisdom of the statement in *O'Callahan v. Parker*, 395 U.S. 258 (1969) that:

(C)ourts-martial as an institution are singularly inept in dealing with the subtleties of constitutional law. 395 U.S. at 265.

Any court system that cannot protect an accused who stands charged before it with a crime from prejudicial external influences such as those herein substitutes trial by ordeal for justice and denies to the accused fundamental fairness. *Rideau, supra; Estes, supra; Burchett v. Texas*, 389 U.S. 109 (1967); *Lyons v. State of Oklahoma*, 322 U.S. 596, 605 (1944); *Lisenba v. California*, 314 U.S. 219, 236 (1941). Judicial calm and dignity after the prejudice had taken place did not make this *fait accompli* a fair trial. See *Brown v. Mississippi*, 297 U.S. 278 (1936).

It is true, as stated by this Court in *Sheppard*, 384 U.S. at 363:

. . . (R)eversals are but palliatives; the cure lies in those remedial measures that would prevent the prejudice at its inception.

However, where there is no cure nor any opportunity

for one, due to defects in the system itself, the palliative is required.

An accused is denied due process when the procedures used to protect him are powerless to do so. Justice is mocked and "due process" fades into no more than two words totally meaningless and totally without effect. It is submitted that if the procedures followed in this case are condoned, the soldier's right to due process of law becomes nothing more than fantasy.

II.

THE COURT OF APPEALS[1] ERRED IN REVERSING THE DISTRICT COURT'S FINDINGS OF A DENIAL OF CONFRONTATION, COMPULSORY PROCESS AND DUE PROCESS OF LAW BY THE REFUSAL OF A CONGRESSIONAL SUBCOMMITTEE TO HONOR SUBPOENAS SEEKING TESTIMONY GIVEN BEFORE THE COMMITTEE.

The Armed Services Subcommittee of the House of Representatives conducted an investigation into the alleged My Lai incident, during which numerous prosecution witnesses were called to testify. The Subcommittee published its report four months before Petitioner's trial began. Petitioner filed a motion to discover this testimony of the witnesses who appeared before the Subcommittee and reiterated the motion throughout the course of the court-martial. (R. 984, 1015, 1346.)[2] The military judge, recognizing the relevancy and importance of the testimony, twice ordered the trial counsel to serve a subpoena *duces tecum* on Congress to obtain the testimony. (App. Ex.

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(1) Five judges of the **en banc** Co rt dissented on this issue.

(2) The basis of the Motion was the Jencks Act, 18 U.S.C. §. 3500, the Sixth Amendment rights of compulsory process, confrontation, and due process of law under **Brady v. Maryland,** 375 U.S. 83 (1963). Contrary to the Court of Appeals majority, the request was for all evidence before the committee. The defense sought the testimony of Secretary of the Army Resor and General Westmoreland in order to prove improper influence in the processing of the case.

203; R. 492-493; App. Ex. 490, 500, 501; R. 3348). The subpoenas were ignored by the Subcommittee and the Congress. Thereafter, the military judge denied Petitioner's motion to strike the trial testimony of these prosecution witnesses and denied his motion to discover the Congressional testimony. It is submitted that the suppression of this testimony by the Subcommittee denied Petitioner his right to confrontation, compulsory process and due process of law[3] and, further, that the general legislative privilege of the House of Representatives to confidentiality must succumb to the particular guarantees embodied in the Bill of Rights. The issue presented is whether a Congressional committee may refuse to honor subpoenas requesting evidence that may be mitigatory, exculpatory, or of impeachment value to an accused. A second question, closely related, is assuming Congress may, by claiming privilege, rightfully ignore the subpoenas and refuse to release the evidence sought, does this refusal abrogate the individual protections afforded by the mandate of the Bill of Rights concerning compulsory process, confrontation and due process of law. The questions are both questions of first impression.

This Honorable Court has not been hesitant to construe and delineate claims arising under the expressed powers granted to Congress by the Constitution. *Doe v. McMillan,* 412 U.S. 306 (1973); *Gravel*

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(3) The Circuit Court majority reversed the District Court which found such a violation. (Appendix A at page 7725-7733; Appendix B at page 704-708.)

v. United States, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966). Petitioner urges the Court not to be hesitant here where an expressed power exercised, though never claimed, emasculates the protections of the Bill of Rights.

Compulsory process may run to members of the Congress. *United States v. Cooper*, 4 U.S. 341 (1800). Clearly, as the late Mr. Justice Holland observed in *Chicago, Burlington and Quincy Railway Company v. Chicago*, 166 U.S. 226 (1897) the prohibitions of the due process clause apply to all three branches of government, including the legislative branch. See also *Mooney v. Holohan*, 294 U.S. 103 (1935); *Carter v. Texas*, 177 U.S. 442 (1899); *Rogers v. Alabama*, 192 U.S. 226 (1905). This principle was perhaps most clearly stated in *Christoffel v. United States*, 200 F. 2d 734, 738-739 (D.C. Cir. 1952) vacated on other grounds, 345 U.S. 947 (1953):

> *The right of an accused by appropriate means to obtain evidence material to his defense is essential to the administration of the criminal law. A subpoena duces tecum to one who has custody of the evidence is an appropriate means. If such evidence is under the control of a department of government charged with the administration of those laws for whose violation the accused has been indicted, and its production is refused, or it is excluded, the courts, having responsibility under the Constitution for the trial of criminal cases, have held that conviction will not be permitted without the evidence. (Citations omitted.) Like principles should apply with regard to evidence in the custody of the House of Representatives. While the privilege of the House must be respected it might give rise to occasions when it would be necessary to forego convicting of the crime because evidence is withheld. There is no doubt some discretion, to be carefully exercised, so as not to invade the constitutional right of an accused to compulsory process. (Emphasis added.)*

While the power of Congress to investigate for legislative purposes exists, it is not without limitations. *Watkins v. United States*, 354 U.S. 178 (1957). This power has traditionally been held to be subject to the limitations imposed by the individual guarantees of the Bill of Rights. *Quinn v. United States*, 349 U.S. 155 (1955); See also *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Indeed, as Mr. Justice Brennan stated in *Hutcheson v. United States*, 369 U.S. 599, 624 (1962):

> *When a Congressional inquiry and a criminal prosecution cross paths, Congress must accommodate the public interest in legitimate legislative inquiry with the public interest in securing . . . a fair trial. (Brennan, J. Concurring.)*

Even though the subpoenas issued herein were ignored by the Subcommittee and no claim of privilege

was ever made,[4] the only arguably valid reason for withholding the evidence sought would be under the generalized privilege of secrecy of Article I:

> *Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require secrecy. U. S. Const. art. I.*

As the District Court recognized, there can be little question that there rests with the House of Representatives a generalized privilege of confidentiality. (Appendix B at page 702). It is submitted, however, that this privilege is subject to the individual protections of the Bill of Rights. The generalized privilege of the Congress herein is similar to that generalized privilege of confidentiality claimed by President Nixon in *United States v. Nixon*, 418 U.S. 683 (1974). In *Nixon*, this Court rejected the idea that a generalized privilege of confidentiality should predominate over the production of evidence sought by the prosecution necessary to the fair administration of criminal justice. Certainly, the prosecutorial right to evidence is not more important than the defense right to similar evidence when it is

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(4) (Appendix A at page 7739.)
Petitioner notes here that Chairman Hebert wrote trial counsel stating that **Brady v. Maryland**, 375 U.S. 83 (1963) and the Jencks Act did not apply to the testimony. As recognized by the dissenting judges on the Court of Appeals, the trial court is the proper tribunal to make this decision, not Congress. (Appendix A at 7737, N. 3). Indeed as this Honorable Court observed in **United States v. Nixon**, 418 U. S. 683, 705 (1974), it is the duty of the courts " 'to say what the law is' ". **Marbury v. Madison**, 1 Cranch 137 (1803).

considered that the Bill of Rights *specifically* guarantees the latter. A claim of privilege under Article I should have no more precedence over the rights to compulsory process and confrontation than a similar claim under Article II.

The Court of Appeals majority totally ignores the *Nixon* precedent in considering this issue. The District Court and the five dissenting judges of the Court of Appeals found *Nixon* directly applicable. (Appendix A at page 7737-7739; Appendix B at 704-708). It is respectfully submitted that the refusal of the majority of the Court of Appeals to apply the constitutional precedents of this Honorable Court is reason enough to grant the Writ herein prayed for.

The majority opinion below offers five reasons for refusal to affirm the District Court's granting of the Great Writ on this issue: (1) Petitioner had the extensive discovery rights given to the military accused. (Appendix A at page 7727); (2) Petitioner was furnished other statements by the witnesses against him made to other investigative bodies. (Appendix A at 7727); (3) "A number of the witnesses did not provide testimony essential to the prosecution's case." (Appendix A at page 7729); (4) The prosecution did not have the statements either. (Appendix A at page 7730); (5) The defense did not demonstrate that the testimony sought was material. (Appendix A at page 7729.)[5] It is respectfully submitted that the reasons advanced are

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(5)The dissenting opinion below ably and clearly refutes the majority's reasoning. (See Appendix A at 7738-7739.)

not valid reasons in light of the constitutional mandates and are in conflict with the decisions of this Honorable Court.

In the fifth reason advanced, the majority opinion, in shades of "Catch 22,"[6] holds, in effect, that Petitioner "cannot know what Congress withheld because he does not know what they withheld." (Appendix A at page 7738).

This rationale is tantamount to allowing the exercise of a generalized legislative privilege to thwart one or both of the "twofold aim(s)" of our criminal justice system by denying a defendant access to material, known to exist, which may be exculpatory because the defendant cannot prove its exculpatory nature because of the denial to release. *c. f. United States v. Nixon,* 418 U.S. 683 (1974); *Berger v. United States,* 295 U.S. 78, 88 (1935). The Court of Appeals majority opinion is in direct conflict with the principles enunciated by this Court in *Nixon.* In our adversary system, the development of "all relevant facts" is "fundamental."

> *The very integrity of the judicial system and public confidence in the system depend upon full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. (Emphasis added.) 418 U.S. at 709.*

(6) J. Heller, **Catch 22,** Simon & Schuster (1961).

The above quoted portion of *Nixon* likewise answers the fourth argument,[7] that since the prosecution did not have the statements, the defense was not entitled thereto. The suppression of evidence by Congressional fiat is just as harmful to Petitioner as is suppression by the prosecution. Congress could, under the majority's rationale, withhold evidence completely exculpating an accused and there would still be no violation of due process.

The Court of Appeals majority misapplies *Brady v. Maryland,* 375 U.S. 83 (1963) and its progeny.[8] The Court reasons that since Congress was not part of the prosecution and since the prosecution did not withhold the evidence, the unequal access requirement of *Brady v. Maryland* was not met. As a result, the Court reasons, there is no violation of due process. While *Brady v. Maryland* and subsequent cases applying the ruling therein hold that where the prosecution withholds, suppresses, or has unequal access to evidence that is mitigating, exculpatory, or of impeachment value, there is a violation of due process, the reverse of this rule is not necessarily true. The essential right here is not a negative one, i.e., that unless the prosecution has the evidence, the accused may not have the evidence. Rather, the positive constitutional mandate is that the accused have access to evidence which is relevant, material, mitigatory, ex-

(7) It also addresses reasons (1) and (2) as well.

(8) **Moore v. Illinois,** 408 U. S. 786 (1972); **Wardius v. Oregon,** 412 U. S. 470 (1973).

culpatory, or of impeachment value to his case. The result reached by the Court of Appeals emasculates the rights of compulsory process, confrontation, and due process so as to leave the administration of criminal justice at the whim and caprice of the Congress.

The majority erroneously assumed, in its second reason, that the evidence withheld was not exculpatory, mitigatory, or of impeachment value and that it contained no information not already furnished the defense. To make this clairvoyant assumption places an insurmountable burden on Petitioner in his attempt to exercise his right to compulsory process. In order to know what the evidence contains, he must know what it contains.[9] To state such a proposition is to answer it. Moreover, the majority's position conflicts with the military judge's finding of relevancy, materiality and importance and his subsequent actions in twice causing a subpoena *duces tecum* to be twice issued to the Congress for the testimony.

The third rationale advanced by the majority, that certain of the prosecution witnesses who testified before the Committee did "not present the heart of the government's case." simply begs the question. Certain prosecution witnesses who testified *were* the heart of the government's case. Captain Medina was one of the

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(9) Parenthetically, the majority assumption that the statements before the Subcommittee contained no information not included in "other statements" furnished the defense causes one to ponder how this assumption is founded when there has been no in camera inspection of the material. Moreover, the military judge found the testimony relevant and material. (Appendix A at page 7740.)

most telling witnesses against Petitioner. He not only was the "heart of the government's case" concerning orders, he was the case. His testimony was in direct conflict with that of Petitioner. He was so important that the Court of Military Review relied on his testimony in making its finding of fact. He was called to testify by the court members themselves. Moreover, Thompson's testimony not only related to specific acts alleged to have been committed by Petitioner but was relied upon by the Court of Military Review to assess Petitioner's *mens rea*, the *sine qua non* of guilt or innocence. (Appendix D at page 1178). That Thompson's trial testimony could have been impeached is clear from the Committee's report.[10] Clearly, these witnesses' testimony had more than an "abstract relationship" to the issues in Petitioner's case. (Contra, Appendix A at page 7728.)

Contrary to the majority opinion, this testimony was of such a nature that "the estimate of the truth-

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(10) The Subcommittee itself questioned Thompson's veracity because of "several substantial inconsistencies" in his testimony. The prosecution and the Court of Military Review likewise relied heavily on the testimony of Haeberle and his photographs for proof of **corpus delicti** and to support the findings. The Subcommittee questioned Haeberle's motives in its report. Other witnesses were similarly important. (App. Ex. 165, Encl. 3; Report of the Armed Services Subcommittee of the House Armed Services Committee, Investigation of the My Lai Incident, pages 16, 45-46, 91st Cong. 2d Sess., (Comm. Print, July 15, 1970); (Appendix D at 1170).

Further, Petitioner emphatically takes issue with the majority's statement that "(t)he defense apparently concedes that there is not even a "reasonable possibility that any of the evidence would be exculpatory . . . " (Appendix A at page 7729.) Not having seen the evidence, Petitioner cannot unequivocally affirm its character. (See Appendix A at 7737.) However, this is not tantamount to the concession supposed by the majority below.

fulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150 (1972). The rights of confrontation and compulsory process include the right to see and cross-examine witnesses against him. *Dowdell v. United States*, 221 U.S. 325 (1911); *Chambers v. Mississippi*, 410 U.S. 284 (1972). One of the main functions of cross-examination is to impeach a witness by eliciting answers which impugn the witness's veracity, capacity to observe and recall and his impartiality. C. McCormick, *Evidence* § 22. This is most often done by use of inconsistent statements. C. McCormick, *Evidence* § 33-40; 3 Wigmore, *Evidence* § 1017-1046; 6 Jones, *Evidence* § 2398-2414. Therefore, part and parcel of the constitutional right of confrontation is the right to impeach the witness's testimony by a prior inconsistent statement. The denial of the right to cross-examine violates due process. *Bruton v. United States*, 391 U.S. 123 (1968). The denial of the testimony was not "harmless error" as defined in *Rosenberg v. United States*, 360 U.S. 367 (1959). Moreover, denial of cross-examination is "constitutional error of the first magnitude and no amount of a showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 (1966); *Chambers v. Mississippi, supra.* The testimony was a "running account" of the events surrounding the commission of the alleged offenses. *Williams v. United States*, 338 F. 2d 286 (D. C. Cir. 1964).

> *A judge would have to assume such statements, being inconsistent with damaging*

> *testimony presented in court, might exculpate the defendant or mitigate his guilt. Given such knowledge, a court should not proceed with the case. Even if it were to strike the testimony of the relevant witnesses or prohibit them from testifying, the court would be unable to know whether exculpatory information in the undisclosed statements would put the case in a different light and lead to an acquittal. Surely the facts amount to suppression. The court's only preventive remedy certain to avoid violating the defendant's compulsory process and Brady due process rights would be to dismiss the case without prejudice. Although dismissal seems a drastic remedy, it is the only procedure by which a court faced with a nondisclosure can avoid the risk of an impermissibly tainted conviction. Moreover, dismissal without prejudice permits the government to reconsider its decision not to disclose, allowing it to renew prosecution. Note, "A Defendant's Right to Inspect Pretrial Congressional Testimony of Government Witnesses," 80 Yale L. J. 1388, 1415-16 (1971).*

The Court of Appeals' rationale, that since the Petitioner had the "procedural advantage" inherent in the military discovery's "equal access," is not justification for denial of the evidence requested herein. This rationale ignores the fact that one may be granted certain rights and denied others and conflicts with the principle established by this Court that a showing of "want of prejudice" will not cure the error. *Brookhart v. Janis*, 384 U.S. at 3. The effect of the

opinion is that by simply ignoring a subpoena, a branch of the government may keep secret exculpatory evidence simply by allowing no one to see that evidence. The end result of such a rationale would be that an innocent man would be convicted simply because the evidence which exculpates him or which mitigates the crime with which he is charged is kept secret by the Congress. In answer to this result, the Petitioner submits the statement of the dissenters below:

> *One underlying principle of American jurisprudence is that no man or institution is above the law. Congress is not exempt from this principle. (Appendix A at page 7740.)*

It is not unreasonable that Congress be subject to the power of a judicial subpoena and a determination by a judicial officer of the materiality of the evidence sought. An *in camera* inspection, as suggested by the dissenters below, would accomplish this, would not violate the congressional privilege of confidentiality, and, at the same time would hold inviolate the individual right of access to this evidence. The Court of Appeals majority opinion below violates that right. ". . . . (T)he government can invoke its evidentiary privileges only at the price of letting the defendant go free." *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

It is submitted that the Congressional privilege of secrecy is subject to the individual's right to evidence. The privilege "cannot prevail over the fundamental demands of the process of law in the fair ad-

ministration of criminal justice." *United States v. Nixon*, 418 U.S. at 712. The end result of the Court of Appeals opinion is that neither the prosecution nor the defense may have access to evidence rules to be material by the trial judge. As in *Nixon*, neither the doctrine of separation of powers nor the need of confidentiality of high level communications, without more, can sustain an absolute, unqualified generalized privilege of immunity from judicial process. This case presents a circumstance where the privilege must give way.

Even were the privilege an absolute privilege, it is submitted that its exercise in this case must result in the freedom of the Petitioner. As this Honorable Court stated in *Nixon*:

> *The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced. 418 U.S. at 711.*

To allow the exercise of the privilege to withhold evidence "would cut deeply into the guarantee of due

process of law and gravely impair the basic function of the courts." 418 U.S. at 711. To allow Congress to suppress evidence such as that herein requires the accused to face the prosecutorial arm of the government deprived of material evidence by the legislative arm of that government. Such smacks of fundamental unfairness.

> *A citizen has the right to expect fair dealing from his government, see Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012, and this entails . . . treating the government as a unit rather than as a amalgam of separate entities. S & E Contractors v. United States, 406 U.S. 1, 10 (1972).*

The Court of Appeals opinion abrogates Petitioner's constitutional guarantees. For this reason, certiorari should be granted.

III.

THE COURT OF APPEALS ERRED IN ITS FINDING THAT THE ARBITRARY REFUSAL OF THE MILITARY COURTS TO APPLY A FEDERAL DISCOVERY STATUTE WAS NOT AN ERROR OF CONSTITUTIONAL MAGNITUDE.

Petitioner sought discovery of the testimony of certain prosecution witnesses pursuant to the Jencks Act.[1] That provisions of the Jencks Act are applicable to courts-martial is conceded. (Appendix A at 7731.) See *United States v. Albo*, 22 USCMA 30, 46 CMR 30 (1972); *United States v. Walbert*, 14 USCMA 34, 33 CMR 246 (1963); *United States v. Heinel*, 9 USCMA 59, 26 CMR 39 (1958); see also *Augenblick v. United States*, 377 F2d 586 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969). Congress, in enacting the Jencks Act, established a procedure to allow an accused discovery of evidence in the hands of the United States.[2] While passed in response to a decision of this Court exercising its "supervisory" powers over federal civil courts, the congressional act established a mandatory procedure of which application to courts-martial is unquestioned. (Appendix B at 700, n. 41.)

During Petitioner's court-martial, the military

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(1) 18 U.S.C. § 3500.

(2) Congress passed 18 U.S.C. § 3500 after the decision of this Court in **Jencks v. United States**, 353 U.S. 657 (1957), an exercise of the Court's supervisory powers over federal civil courts.

judge arbitrarily[3] refused to apply the Jencks Act to testimony given by prosecution witnesses to a congressional committee. The Army Court of Military Review affirmed. (Appendix D at 1184-1195.) The Court of Military Appeals refused to review the issue. The District Court below found that the Court of Military Review erred in finding the Jencks Act inapplicable to congressional testimony. (Appendix B at 700-701.) The Court of Appeals, citing *United States v. Augenblick*, 393 U.S. 348 (1969), reversed, reasoning that a violation of the Jencks Act was not an error of constitutional magnitude. (Appendix A at 7731-7733.)

In *Augenblick*, this Court held that, where there was *no credible evidence* of *suppression* of Jencks Act statements, where the proof showed that the statements *could* not be located in spite of a diligent search, and where the law officer ruled that the government bore the burden of producing the statements or explaining why it could not do so, no error of a constitutional level existed. *United States v. Augenblick*, 393 U.S. at 354-356.

It is respectfully submitted that the Court of Appeals misinterpreted the decision in *Augenblick* as a categorical statement that a Jencks Act violation can never reach constitutional proportions. The first distinction between *Augenblick* and the case *sub judice*

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(3) The arbitrary nature of the decision is evidenced by the fact that another military judge reached an opposite conclusion on an earlier date in another My Lai case. **United States v. Mitchell**, Decision on the Jencks Act Motion (U.S. Army, Oct. 15, 1970) cited in Note, "A Defendant's Right to Inspect Pretrial Congressional Testimony of Government Witnesses," 80 Yale L. J. 1388 (1971).

is that the law officer *applied* the Jencks Act in *Augenblick* while the military judge refused to apply it in Petitioner's case. Moreover, there was no evidence of suppression in *Augenblick*. The suppression by Congress in Petitioner's case is conceded. In *Augenblick*, there was no evidence that the tapes existed at the time of trial and in spite of "an earnest effort" to "locate them," they "could not be found." 393 U.S. at 355-356. In Petitioner's case, it is conceded that the statements exist and everyone knows where they are. (Appendix A at 7737). These factors bring this case clearly and firmly under the statement by this Court in *Augenblick* that "in some situations, denial of a Jencks Act type of statement" might reach constitutional error. 393 U.S. at 356. Surely this Honorable Court did not intend by its decision in *Augenblick*, to allow military courts to arbitrarily and capriciously deny to a particular military accused a statutory discovery right given to others.

The Court of Appeals' reading of *Augenblick* is historically contradictory to this Court's decisions regarding "due process of law." "Due process of law" as embodied in the Fifth Amendment has been historically defined as synonymous with "by the law of the land."[4] In 1642, Lord Coke defined trial by due process as trial "by the law of the land." *In re Winship*, 397 U.S. 358, 379 (1970) (Black, J., dissenting). This

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(4) Indeed, as early as 1363, it was clear that the phrases were synonymous and interchangeable. 37 Edward III (1363), Ch. XVIII, 1 Statutes of the Realm 382, cited in R. Mott, "Due Process of Law" (1926), p. 5.

Court has historically adhered to this definition; *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856); *Davidson v. New Orleans*, 96 U.S. 97 (1878); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940); *In re Winslip*, 397 U.S. at 384.

Even though there has historically been disagreement as to whether due process as embodied in the Bill of Rights encompasses the somewhat abstract ideas of "fundamental fairness," "principles implicit in the concept of ordered liberty," "natural law due process notions,"[5] the Court has consistently held that due process, at the very least, means "by the law of the land — that is according to written constitutional and statutory provisions as interpreted by court decisions." *In re Winslip*, 397 U.S. at 381-382. A trial in accordance with due process of law must mean a trial in accordance with the guarantees of the Constitution and "such acts of the legislature as are consistent with the Constitution." *Trustees v. Foy*, 5 N.C. 57, 63, 3 Am. Dec. 672 (1805).

Congress, in enacting the Jencks Act, established a statutory discovery procedure not inconsistent with the Constitution. *Palermo v. United States*, 360 U.S. 343 (1959). This statutory procedure is unquestionably applicable to the military. The arbitrary refusal to apply

(5) See **Sniadack v. Family Finance Corp**, 395 U.S. 337 (1969); **Rochin v. California**, 342 U.S. 165, 172 (1952); **Palko v. Connecticut**, 302 U.S. 319, 325 (1937); **Griswold v. Connecticut**, 381 U.S. 479 (1965); **Adamson v. California**, 332 U.S. 46 (1947); **Irvin v. Dowd**, 366 U.S. 717 (1961).

the statute in Petitioner's case deprived him of a statutory procedure that was a part of the law of the land applicable to military trials — due process. The refusal to apply the statute emasculated one essential portion of due process and left the Jencks Act as the "law of the land" for a chosen few.

The Jencks Act provides the defense with access to prior statements of prosecution witnesses in the possession of the United States. The District Court rejected the Court of Military Review's reasoning that the words, "United States," as used in the Jencks Act, did not encompass Congress; that the doctrine of separation of powers dictated such a reading; and that, even if their reasoning was erroneous, there was no prejudice as a result of the military judge's failure to strike the testimony of the numerous witnesses in spite of the dictates of the Act. (Appendix B 700-701.)[1]

"United States" is defined, as it applies to Title 18, U.S.C. and the Jencks Act, only in the territorial sense:

> *The term 'United States,' as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone. 18 U.S.C. §5.*

The second usage of "United States" in the definition

(1) The District Court determined further that the Fifth and Sixth Amendments required production of the testimony and that there was prejudice as a result of the withholding. (See Reasons Why Certiorari Should Be Granted, II, **supra**.)

refers to something other than the territorial sense. The term "United States" in § 3500 is likewise not used in the territorial sense.

The term "United States" may be used in the sense of a sovereign power, *Hooven & Allison Co. v. Evatt, Ohio,* 324 U.S. 652 (1945), or simply as the collective name of the several states united by and under the Constitution, *Texas v. White,* 74 U.S. 700, 721 (1868). In the political or governmental sense "United States" is the republic or federal state formed by the people of the states by the adoption of the Constitution. This federal state possesses certain powers or attributes of a sovereignty, namely, legislative, judicial and executive powers. *McCulloch v. Maryland,* 17 U.S. 316 (1819). These powers are by definition exercised by the sovereign through its component parts under the Constitution. U. S. Const. art. I, II, III.

Certain activities of the sovereign may only be done by the separate branches. For example, only the legislative branch may impose taxes. As broad as each branch's independent powers are, one branch is precluded from entering the exclusive province of one of the other branches. *Barenblatt v. United States,* 360 U.S. 109 (1959). Congress, for example,

> *(L)acking the judicial power given to the judiciary . . . cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the executive in what exclusively belongs to the Executive. 360 U.S. at 111.*

Congress, through its powers to regulate the armed forces, created a system of justice which operates in

the name of the "United States." In a court-martial, the trial counsel represents the sovereign in performing his prosecutorial function. Inside the courtroom, he is the "United States" in its prosecuting role only. However, the United States is not limited to the prosecutor alone.

Congress, did not restrict the definition of "United States" to the person of the prosecutor or his agents in the Jencks Act.

> *The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies. Rule 16 and the Jencks Act refer, respectively, to evidence gathered by 'the government' and the 'United States,' not simply held by the prosecution. United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971).*

There is no definition for the term "United States" in the Uniform Code of Military Justice.

The Court of Military Review, as found by the District Court, confused the meaning to be given "United States" with the function being performed by the "United States" in a particular setting and read the term "United States" as meaning the prosecutor only. The "United States" means the United States as a unit. The fact that its prosecutorial function may well be performed by the trial counsel is not tantamount to making the trial counsel, the part, the equivalent of the United States, the whole. The Court of Military Review's approach separated the "United States" into separate entities.

> *A citizen has the right to expect fair dealing from his government, see Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed 2d 1012, and this entails . . . treating the government as a unit rather than as an amalgam of separate entities. S & E Contractors v. United States, 406 U.S. 1, 666 (1972).*

It is respectfully submitted that "United States," as used in the Jencks Act, means the sovereign unit, *Hooven & Allison Co. v. Evatt, Ohio, supra,* and not an amalgam of separate entities. *S & E Contractors v. United States, supra.* By definition, Congress is a part of this unit. *McCulloch v. Maryland, supra.*

The military court's reasoning that to apply the Jencks Act to the congressional testimony would cause a constitutional problem involving separation of powers is specious. This rationale presupposes military courts to be courts created under Article III of the Constitution or that there can be a conflict between the powers of Congress and the powers of military courts. This simply can not be. In a government of enumerated powers, the different branches have no power not defined and limited by the Constitution. *United States v. Cruikshank,* 92 U.S. 542, 551 (1876). Congress has the power to pass all laws necessary or proper for carrying into execution the specific powers conferred by the Constitution, *Luxton v. North River Bridge Company,* 153 U.S. 525, 529 (1894), and its power to act within its own sphere is supreme and independent. *O'Donoghue v. United States,* 289 U.S. 516 (1933). It was in this context, under its Article I power to regulate the armed forces, that Congress created the military justice system.

The sparse legislative history supports the Petitioner's position, 103 Cong. Rec. 15931 (1957); Senate Reports 981, August 15, 1957. 1957 U.S. Code Congressional and Administrative News, p. 1862; 103 Cong. Rec. pp. 15781-15941, as does the case law, *Harney et al v. United States,* 306 F. 2d 253 (1st Cir. 1962); *United States v. Lev,* 258 F. 2d 9, 13 (2d Cir. 1958), *aff'd,* 360 U.S. 470 *reh' denied* 361 U.S. 856; *United States v. Tane,* 29 F.R.D. 131, 133 (E.D.N.Y. 1962), and a well written law review article concerning the issue. Note, "A Defendant's Right To Inspect Pretrial Congressional Testimony of Government Witnesses," 80 Yale L. J. 1388 (1971).

There was never any dispute as to the form of the recorded congressional testimony. The Sub-committee's report states:

> *During its investigation, the Subcommittee interviewed 152 witnesses, held 16 days of hearings, took 1812 pages of sworn testimony and reviewed hundreds of documents. In addition, the Subcommittee staff took 3045 pages of statements from witnesses. (See also App. Ex. 165, Incl. 7.)*

When the House refused to comply with the sub-poena, the "United States elect(ed) not to comply" with the order and the Jencks Act requires that the trial judge to "strike" the witnesses' testimony. The refusal to strike the testimony denied Petitioner due process.

IV.

THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S RULING THAT PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND COMPULSORY PROCESS AND WAS THEREBY DENIED DUE PROCESS OF LAW.

(A)

As recognized by both the Court of Appeals and the District Court, there is no evil in the military system more condemned than that of improper command influence. *United States v. Hedges,* 11 USCMA 642, 29 CMR 458 (1960); *United States v. Coffield,* 10 USCMA 77, 27 CMR 151 (1958); *United States v. Sears,* 6 USCMA 661, 20 CMR 377 (1956). (Appendix A at page 7710; Appendix B at page 693.) Petitioner contended that improper influence had permeated the processing of the charges against him in order to insulate superiors. The military judge ruled that a *prima facie* case of command influence had been shown and directed the prosecution to rebut this showing. As a result, certain individuals involved in the processing of the charges were subpoenaed by the prosecution. In substance, they denied that they had been influenced by their superiors. Petitioner requested subpoenas for certain rebuttal witnesses including Secretary of Defense, Melvin R. Laird, Secretary of the Army, Stanley Resor and Chief of Staff of the Army, General William C. Westmoreland. The prosecution refused to subpoena these

witnesses. The defense petitioned the military judge stating that the witnesses were necessary and further stating the substance of their expected testimony. (App. Ex. 35). In an oral offer of proof, counsel stated precisely what the testimony of these witnesses was expected to be. (R. 115). The military judge denied the request for subpoenas on procedural grounds in spite of complete compliance with the requirements of Paragraph 115a, *Manual for Courts-Martial, United States,* 1969 (Rev. ed.) (Appendix B at page 693-694.)[1]

Contrary to the Court of Appeals' opinion, it is apparent that those entrusted with the pre-trial preparation of Petitioner's case knew of the concern of the Secretary of the Army, Secretary of Defense and the President of the United States, were aware of their superiors' desires, and had twice received messages from their superiors to forestall any decisions until additional instructions were received. (R. 164, 185, 194-195, 222-223, 258.)[2]

The Court of Appeals reasoned that, after having obtained the military judge's *final* ruling denying the request for subpoenas, trial defense counsel's[3] statement of a willingness to "find out" if the requested

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(1) It should be noted that, in spite of the "equal opportunity" provision of Art. 46 U.C.M.J., 10 U.S.C. § 846, the **prosecutor** makes the initial decision of whether to subpoena defense witnesses in the military.

(2) While counsel originally learned of the manner in which the case was processed from media reports, the testimony of the prosecution witnesses added support to the reports.

(3) Petitioner was represented at trial by Mr. George W. Latimer, Major Kenneth A. Raby, Mr. R. B. Kay, and Captain Brooks Doyle.

witnesses would grant an "interview" constituted a waiver of the issue. (Appendix A at 7724.) The result reached by the Court of Appeals ignores the facts: the military judge had made a final ruling based on non-compliance with procedure (R. 308); the defense was in complete compliance with the procedural requirements; the military judge unreasonably and arbitrarily changed and added to the requirements for compulsory process; and no reason whatsoever was given to justify the change of procedure.

Counsel for Petitioner fully complied with the procedural requirements stated in the *Manual*. In addition, counsel made an offer of proof stating with specificity what the requested witnesses were expected to say:

> *I would expect Secretary of Defense Laird to testify that in the conference — that he went to the President of the United States and in a conference with the President of the United States, he in substance and effect said, 'We have to prosecute Lieutenant Calley for murder.' I would expect that Secretary of Defense to say that. I would expect the Secretary of Defense to say that upon receiving those orders, he contacted Secretary of the Army, Secretary Resor, and told him that he had cleared it with the President of the United States and that he, Secretary Resor, was to go ahead and have Calley prosecuted. I would expect Secretary Resor to come in and say that when he received that information from Secretary of Defense*

> *Laird, he went to the Chief of Staff and directed that proceedings be brought upon Lieutenant Calley for first degree murder. I would expect that the Chief of Staff would say that that command was carried right down the chain of command to the Commanding General here at Fort Benning, Georgia, and he was told in substance and effect that the matter had been cleared from the top and Lieutenant Calley was to be convicted — to be charged — excuse me — to be charged with first degree murder. I would say that that information went right on down to the people who prepared the charges and specifications, and that in those instances where they signed the charges and specifications, they were influenced by the directions from on high. (R. 115).*

Procedurally, the *Manual* requires (1) a synopsis of the testimony the witness is expected to give, (2) full reasons which necessitate the personal appearance of the witness and (3) any other matter showing that the expected testimony is necessary to the ends of justice. Fair appraisal of the petition and the offer of proof shows that every essential requirement of the *Manual* was met. The defense complied with both the spirit and the letter of the *Manual*.

In addition to the Sixth Amendment, Article 46, U.C.M.J., 10 U.S.C. § 846, guarantees "equal opportunity" to call witnesses. Petitioner had presented a *prima facie* case of command influence. The rebuttal witnesses for the government conceded knowledge of

the wishes of higher-ups although denying that they were influenced. In addition, they admitted receiving instructions as to how the charges would be drafted, i. e., murder, not war crime.[4] The *ad hoc* change of procedural requirements by the military judge was unprecedented and arbitrary.

Moreover, the additional requirement was unreasonable under the circumstances. More than 100 witnesses from all parts of the country and Vietnam testified at Petitioner's trial. Scores of others were interviewed. Petitioner was denied his own investigator. Trial defense attorneys were required not only to interview the witnesses that were subpoenaed but to investigate to find the ones that were relevant. After making the demonstration of relevance herein and compliance with the procedural requirements, the defense should not have been required to do more to obtain their presence.

By requiring a personal interview, the military judge, in effect, required defense counsel to ask the Secretary of the Army, Secretary of Defense and Army Chief of Staff to possibly incriminate themselves. [5] The folly of such a procedure is self-evident. The witnesses requested would have been "hostile" by the very nature of the issues concerned. To require the

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(4) This is supportive of Petitioner's position that there was an all-out effort to insulate higher-ups from the command responsibility imposed under the principle enunciated in **United States v. Yamashita,** 327 U. S. 1 (1945).

(5) Art. 37, U.C.M.J., 10 U.S.C. § 837.

defense to interview them outside the guarded procedures of the courtroom and the judicially omnipresent penalty for perjury and contempt in order to have them admit their own interest and wrongdoing would have been futile. The Sixth Amendment requires more.

An accused's right to compulsory process encompasses those witnesses who are "relevant and material" and if the request is not "frivolous" in nature, it must be granted. *Greenwell v. United States,* 317 F. 2d 108 (D.C. Cir. 1963), *United States v. Hathcock,* 441 F. 2d 197 (5th Cir. 1971). The Sixth Amendment guarantees an accused the right to compel the attendance of witnesses in his behalf whether they will support his defense or negate the government's evidence. See *Greenwell v. United States,* 317 F. 2d 108 (D.C. Cir. 1963). Confrontation and the compulsory process concommitant therewith are among the most basic and fundamental of all constitutional rights. *Illinois v. Allen, 397* U.S. 337 (1970). They are included in due process, *Pointer v. Texas,* 380 U.S. 400 (1965), and their violation requires reversal. *Bruton v. United States,* 391 U.S. 123 (1968).

The assumption of waiver by the Court of Appeals contradicts the principles enunciated in the cases decided by this Court. Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Barker v. Wingo,* 407 U.S. 514, 526-527 (1972); *Johnson v. Zerbst,* 304 U.S. 458, 464d (1938). The denial of the right of confrontation is the denial of a fundamental constitutional right and constitutional error of the first magnitude. *Illinois v. Allen, supra;*

Brookhart v. Janis, 384 U. S. 1 (1966). Courts must "indulge every reasonable presumption against waiver" and "they should not presume acquiescence in the loss of fundamental rights." *Barker v. Wingo*, 407 U.S. at 526; *Carnley v. Cochran*, 369 U.S. 506, 514 (1962). The facts in this case belie the Court of Appeals' assumption of waiver. cf. *Brookhart v. Janis, supra*, 384 U.S. at 4-5. Indeed, Petitioner complied with every procedural requirement in an attempt to exercise his right to confrontation and compulsory process.

The Court of Appeals erroneously found that the District Court exceeded the proper scope of review in completely "disregarding the finding of the military judge and the Court of Military Review that there was no factual basis for the allegations." (Appendix A at page 7723). To ignore facts and then state that there is no factual basis is not to give "full and fair consideration" to the issue. cf. *Burns v. Wilson*, 346 U.S. 137 (1953). A rejection of Petitioner's position by simply stating that it was considered is not "full and fair consideration." The consideration must be meaninful. Failure to consider facts pointing to constitutional defects is not equivalent to full and fair consideration. The military judge and the Court of Military Review gave no meaningful consideration to the facts set forth in the District Court's opinion. (Appendix B at pages 695-699).

(B)

The Petitioner made a written request for a subpoena for a witness, Tunstall, in order to impeach a

"key prosecution" witness, Conti. (R. 2248-2251.) Conti testified concerning Petitioner's actions and state of mind. (R. 1807-1914.) Petitioner requested Tunstall's presence in order to prove that Conti was hostile and had a vendetta against Petitioner because he had prevented Conti from raping a Vietnamese. (R. 2248-2251.) Conti denied any wrongdoing whatsoever. The military judge refused to order the issuance of the requested subpoena and required an affidavit "that this rape occurred, that Calley was present, and that Lieutenant . . . You've got to comply with the Manual provisions." (R. 2251.) Interestingly, there is no provision in the *Manual* that requires any such affidavit. [5]

The Court of Appeals erroneously assumed that Tunstall's testimony was cumulative only. The testimony of Tunstall was different from any witness at trial. The Court ignores the fact that impeachment of Conti did not occur as the Court of Military Review referred to Conti as a "key" witness during its fact-finding opinion. To show bias or to impeach Conti by refuting his statements would have been of great benefit to Petitioner. The denial of an impeachment witness is the denial of a basic constitutional right.

For all of the above reasons, certiorari should be granted on this issue.

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(5) Once again, the military judge changed the procedural requirements.

V.

THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S RULING THAT THE CHARGES AND SPECIFICATIONS UNDER WHICH PETITIONER WAS TRIED DENIED HIM THE CONSTITUTIONALLY REQUIRED NOTICE AND SUBJECTED HIM TO DOUBLE JEOPARDY.

At his court-martial, Petitioner repeatedly requested that the government be required to make more specific the two broad allegations that he had killed unknown and unidentifiable numbers of unknown and unidentifiable people of unknown and unidentifiable ages and sex in unspecific and unidentifiable locations. In sum, he could not learn what he had to defend against from the all encompassing charges. Although requiring the government to submit a Bill of Particulars,[1] the military judge refused to require the government to give further specifics in those areas above mentioned.

A person's right to reasonable notice of the charge against him is basic to our system of jurisprudence. *In re Oliver*, 333 U.S. 257, 273 (1948). Notice of charges with such specificity so as to allow the accused to defend against those charges is inherent in due process. *Ungar v. Sarafite*, 376 U.S. 575 (1964); *Fuentes v. Shevin*, 407

(1)The Bill of Particulars did not identify any individual as being one that the Petitioner killed or ordered to be killed nor any identifying characteristics of the alleged victims.

U.S. 67 (1972); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). (Appendix B at 709).

The constitutional test as to whether a charge is definite enough to meet notice requirements under due process is whether the accused is reasonably apprised of what he must defend against, and whether the record is sufficient to enable him to avoid a second conviction for the same offense or included offenses. *Russell v. United States*, 369 U.S. 749, 763-764 (1962).

Petitioner was charged in two specifications with the premeditated murder of not less than 30 and 70 Oriental human beings, respectively, whose names and sexes were unknown. The first specification referred to a group of individuals in the vicinity of the southern edge of the village. There was more than one such group in "the southern edge of the village" and there were those individuals clearly killed by soldiers other than Petitioner and not at his behest. (R. 2818-2819; 2754; 3212; 3108.) The evidence was unclear as to whether the killings proved occurred in the center of the village or on the perimeter trails and the specifications did not fix specific time, location or numbers. As to the second specification, there was more than one group of individuals "somewhere in the eastern portion of the village," some were there before Petitioner arrived and others were not killed by him. (R. 2267; 1333-1334; 1516; 2044; 2864.)

Research reveals no military or federal case involving an offense against the person in which multiple victims have been alleged in a single specification or count of an indictment. In each of the state cases that have discussed this issue, *People v. Alibez*, 49 Cal. 452

(1875); *Ramsey v. State*, 33 Ga. App. 77, 125 S. E. 77 (1924); *State v. Batson*, 108 La. 479, 32 So. 478 (1902); *Nixon v. Alabama*, 268 Ala. 101, 105 So. 2d 349 (1958); *Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234 (1853); *State v. Morrison*, 184 La. 39, 165 So. 323 (1936); *State v. Ayers*, 70 Ida. 18, 211 P. 2d 142 (1949); *Wilkinson v. State*, 77 Miss. 705, 27 So. 639 (1900); *Cornell v. State*, 104 Wis. 527, 80 N.W. 745 (1899), the victims were readily identifiable. Such is not the case here.

The killing of many people in the ditch resulted from several acts of others and not from one act of the Petitioner. However, the specification alleged this to be the case. (R. 1816.) The testimony indicated that different groups of people were killed at different times and in different places in the ditch. (R. 1816, 1944, 1996, 1997.) There were several separate acts by different people constituting several possible offenses offered by the prosecution to prove one general allegation. The prosecution was not required to specify and limit their case to one time or to one incident at the ditch. As a result, it was impossible to prepare Petitioner's defense since the testimony of the witnesses was self-contradictory as to what took place and as to who did it. The testimony indicated that several groups of people were shot at the ditch at different times and not one large group shot at the same time. Therefore, it was impossible for the Petitioner to determine which time or which group of bodies in the ditch he was charged with killing. The Petitioner was not present during the time certain killings testified to took place. However, the military judge refused to limit the government in any way, thus leaving the Petitioner in *the impossible*

situation of trying to prepare an adequate defense against all the separate offenses which the court could use to find him guilty of the one general offense alleged in the specification.

The government chose not to charge an offense for each separate victim,[2] but, instead, chose to consolidate all of the alleged killings at *a ditch* into one specification and all of those on *a trail* into another specification. The government then chose to charge separately two alleged killings at *a ditch* during the same time period. Once the government chose to treat the alleged multiple killings at *a ditch* as one transaction and charge such in one offense, it should not have been allowed to select particular alleged deaths from the multitude and charge them separately. All of the alleged killings could have been charged either individually or as one war crime. The government was allowed to have the benefit of both theories when it should have been required to elect only one. As a result, Petitioner was twice placed in jeopardy for his life in violation of the Fifth Amendment.

One is twice put in jeopardy if he is put upon trial a second time for an offense of which he has been once acquitted or convicted. *Bens v. United States*, 266 F. 152, *cert. den.* 254 U.S. 634 (2d Cir. 1920); *Bowles v. Hoffman*, 61 F. Supp. 137 (D. Ga. 1945). The test of

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(2) Art. 118, U.C.M.J., 10 U.S.C. 918 states that any person who, without justification or excuse, unlawfully kills a **human being**, with premeditation is guilty of murder. The provision is in the singular. The alleged killing of each person in this case constituted a separate offense charged.

double jeopardy in cases involving a multiplicity of counts is whether a conviction on one count and an acquittal on another will bring about a contradiction on the verdict. *United States v. Marzani,* 71 F. Supp. 615, 618 (D.D.C. 1947), *aff'd,* 168 F2d 133, *aff'd,* 335 U.S. 895, *adhered* to at 336 U.S. 922. Jeopardy attaches when the jury is impaneled and sworn, *United States v. Fancher,* 323 F. Supp. 1069 (D.S.D. 1970). Double punishment for what is the same offense, not *eo nomine,* but the same transaction is forbidden. *Johnson v. Rhay,* 266 F2d 530 (9th Cir. 1959). Where a person has been tried and convicted for committing an act amounting to a crime, his subsequent conviction for the same offense is prohibited. *United States v. Sabella,* 272 F2d 206 (2d Cir. 1959). Finally, if a person, in one trial upon the first charge, could have been convicted of the offense in the second charge, he has been placed in jeopardy and his conviction of the second charge is barred. *State v. Martin,* 154 Ohio St. 539, 96 N. E. 2d 776, 778 (1951).

The idea of double jeopardy is a fundamental right incorporated into our American system of justice, *Benton v. Maryland,* 395 U.S. 784 (1969); *Walton v. Beto,* 421 F2d 1383 (5th Cir. 1970). The amendment protects against the "risk" or "potential" that an accused may be convicted of the same offense for which he was initially tried, *Price v. Georgia,* 398 U.S. 323 (1970), and multiple conviction and punishment for the same offense is prohibited. *United States v. Coke,* 404 F2d 836 (2d Cir. 1968).

As clearly shown in the District Court's opinion, (Appendix B at page 710), Petitioner was subjected to the "risk" or "potential" of being convicted of the same

offense twice in the same trial. The following hypothetical illustrates. Suppose that an accused is charged with the premeditated murder of unnamed human beings A, B, C, D, E and F, sex and age unknown, in one charge and of X and Y, unnamed human beings, sex and age unknown, in the second charge. These murders are alleged to have occurred in the same general location in a small village. The proof adduced at trial shows that this location was, in fact, the same location, a ditch. Moreover, the witnesses who identify or number those in the first charge saw the bodies of those in the second charge among those counted in the first group. Certainly, it would be improper for the jury to find that X was in fact B, and Y was D, and return a finding of guilty as to both charges. Such would subject the accused to double jeopardy because he was convicted of killing B twice and D twice. The same would be true if the jury, by exceptions and substitutions, had found the accused guilty of the murders of A, B, D and F in the first charge since those unidentifiable persons excepted from the findings were not shown to be X and Y.

The hypothetical is, in substance, what happened in this case. No witness separated the bodies in the ditch when they made their estimates of the number of bodies in the ditch. Sledge, the only witness as to the offenses alleged in the Additional Charge, did not give an estimate minus the man-in-white and the child. On the other hand, [illegible]en saw the man-in-white in the ditch, but gave only [illegible] estimate. It is submitted that the government nad to prove the separateness of the offenses as to the separate victims. The jury did not

return special findings. Thus, the unidentified man-in-white and the unidentified child could well have been counted by the witnesses as being among the total number of unidentified bodies in the ditch from which these witnesses gave their estimates. Any doubt must be resolved in the Petitioner's favor. Therefore, it must be assumed that the man-in-white and the child were included in the military jury's findings.

Although the issue of double jeopardy normally arises from an accused's involvement in two proceedings, *Green v. United States*, 355 U.S. 184 (1957); *Downum v. United States*, 372 U.S. 734 (1963); two proceedings are not necessarily required for jeopardy to attach. *State v. Inzitari*, 6 Conn. Cir. 170, 269 A2d 35 (1969).

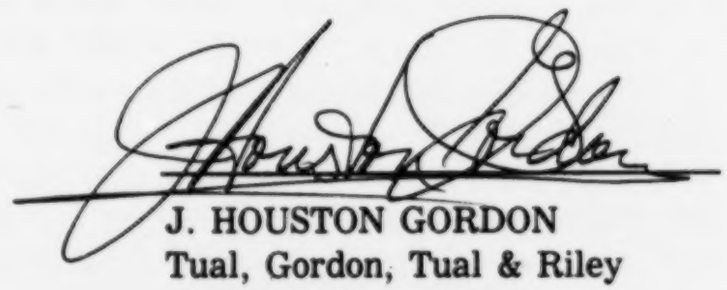
It is not the contention of counsel that an accused may not be charged and convicted of separate offenses arising out of one act. *Gore v. United States*, 357 U.S. 386 (1958). However, it is strongly urged that one may not be convicted twice for the same offense and that it is incumbent on the government to show that the offenses were, indeed, separate. The government failed to do the latter in this case. As a result, the Petitioner ran the "risk" of being twice tried and twice convicted for the deaths of the man-in-white and the child, in violation of the Fifth Amendment.

For these reasons, this Honorable Court is urged to grant the writ of certiorari on this issue.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED this 28th day of November, 1975.



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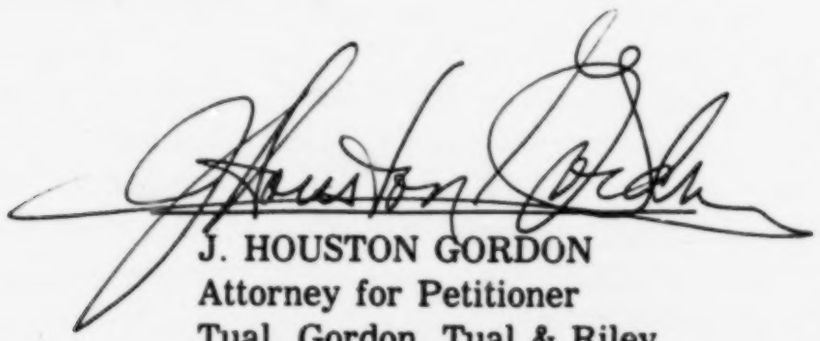
CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of November, 1975, caused to be served upon the Respondents a copy of the Petition for Writ of Certiorari, to: The Solicitor General of the United States, United States Department of Justice, Washington, D. C., to: Captain Arnold Anderson Vickery, Office of the General Counsel, Department of the Army, Washington, D. C., to: The Secretary of the Army, Department of the Army, Washington, D. C., to: Charles T. Erion, Assistant United States Attorney, P. O. Drawer U, Macon, Georgia 31202, via registered mail, properly addressed, and with sufficient postage affixed thereto.



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Appendices A, B, C, and D are filed separately herewith.

APPENDIX E

AMENDMENT V:

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . .

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, . . .

ARTICLE I, SECTION 5, CLAUSE 3

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy ., . .

ARTICLE I, SECTION 8, CLAUSE 14

Congress shall have power:
To make rules for the government and regulation of the land and naval forces.

18 U.S.C. § 5

United States defined.

The term "United States," as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.

18 U.S.C. § 3500, Jencks Act, as amended 15 October 1970, 84 Stat. 926, provides:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendent, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement

ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such proceduure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. (Emphasis added.)

Article 46, Uniform Code of Military Justice, 10 U.S.C. 846:

Opportunity to obtain witnesses and other evidence.

The trial counsel, the defense counsel, and the court-martial shall have *equal* opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

Article 118, Uniform Code of Military Justice, 10 U.S.C. 918:

Murder.

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he —

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct. (Emphasis added.)

Paragraph 115a, *Manual for Courts Martial, United States (Rev. Ed.):*

115. ATTENDANCE OF WITNESSES. a. General. The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the

production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions (Art. 46).

The formal written instrument or process that serves to summon a witness to appear and testify is a subpoena. A subpoena cannot be used for the purpose of compelling a witness to appear at an examination before trial, except for the taking of a deposition. See, however, Article 135 as to courts of inquiry.

In this paragraph (115) the term 'trial counsel' includes a summary court-martial unless the context indicates otherwise. See 79b concerning the authority of summary courts-martial to compel the attendance of witnesses.

The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense. He will not of his own motion take that action with respect to a witness for the prosecution unless satisfied that the testimony of the witness is material and necessary. The trial counsel will take similar action with respect to all witnesses requested by the defense, except that when there is disagreement between the trial counsel and the defense counsel as to whether the testimony of a

witness so requested would be necessary, the matter will be referred for decision to the convening authority or to the military judge or the president of a special court-martial without a military judge according to whether the question arises before or after the trial begins. A request for the personal appearance of a witness will be submitted in writing, together with a statement, signed by the counsel requesting the witness, containing (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons which necessitate the personal appearance of the witness, and (3) any other showing that the expected testimony is necessary to the ends of justice. The decision on the request must be made on an individual basis in each case by weighing the materiality of the testimony and its relevance to the guilt or innocence of the accused, together with the relative responsibilities of the parties situation. If the convening authority determines that the witness will not be required to attend the trial, the request may be renewed at the trial for determination by the military judge or the president of a special court-martial without a military judge, as if the question arose for the first time during the trial. (Emphasis added.)

Supreme Court, U. S.
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No. 75-773

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM L. CALLEY, JR., PETITIONER

v.

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 519 F. 2d 184. The opinion of the district court (Pet. App. B) is reported at 382 F. Supp. 650. The opinion of the United States Court of Military Appeals (Pet. App. C) is reported at 22 U.S.C.M.A. 534, 48 C.M.R. 19. The opinion of the United States Army Court of Military Review (Pet. App. D) is reported at 46 C.M.R. 1131.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1975. The petition for a writ of cer-

tiorari was filed on November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether pretrial publicity denied petitioner a fair trial.

2. Whether the refusal of a congressional subcommittee to release testimony taken in executive session deprived petitioner of due process.

3. Whether the refusal to issue certain subpoenas requested by the defense deprived petitioner of his Sixth Amendment rights to confrontation and compulsory process.

4. Whether the Charges, Specifications and Bill of Particulars adequately apprised petitioner of the charges against him and protected him from being twice placed in jeopardy.

STATEMENT

1. In April 1969, the Department of the Army received reports of a massacre of Vietnamese civilians by United States forces on March 16, 1968, at My Lai (4) hamlet, Song My village, Quang Ngai province, Republic of South Vietnam. After a thorough investigation, petitioner, who was then a first lieutenant in the United States Army, was charged with the premeditated murder of not less than 100 of the Vietnamese civilians killed at My Lai, in violation of Article 118 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. 918. This Initial Charge, as refined by a Bill of Particulars, alleged in two separate

specifications that petitioner was responsible for the murder of not less than 30 Oriental human beings at a trail in the southern portion of the village (Specification 1) and not less than 70 Oriental human beings in a ditch on the eastern edge of the village (Specification 2). Subsequent investigation led to the preferral of an Additional Charge, also containing two specifications, alleging that petitioner had murdered two Vietnamese civilians—an old man (Specification 1) and a child about two years old (Specification 2), in violation of Article 118. On November 24, 1969, the charges were referred to trial by general court-martial at Fort Benning, Georgia (Pet. App. A, p. 7692).

2. The evidence at trial—which began on November 12, 1970, and ended with petitioner's conviction on March 29, 1971—is set forth in detail in the opinion of the Army Court of Military Review (Pet. App. D, pp. 1163–1173). The evidence showed, in essence, that petitioner was a platoon leader in "C" Company, which was ordered on March 15, 1968, to seize the hamlet of My Lai and destroy all that could be useful to the enemy. The unit was informed by Task Force Headquarters that it could expect resistance from the enemy. The attack began on the morning of March 16. Encountering only unresisting civilians and no Viet Cong soldiers, petitioner's platoon—which was to lead the sweep through My Lai—quickly became disorganized. During a period lasting between two to four hours on the morning of March 16, petitioner super-

vised and participated in the systematic killing of a large number of villagers (Pet. App. D, pp. 1163–1164).

The specifications against petitioner separated the killings into four chronologically distinct episodes. The evidence under Specification 1 of the Initial Charge showed that petitioner shot, and ordered to be shot, numerous old men, women and children along a trail in the southern part of the village. Photographic evidence depicted about 20 bodies strewn along the trail. Presumably because of the testimony of a pathologist that only one wound on one body was certain to have been instantly fatal, the court found petitioner guilty of murdering not less than one person on the trail (*id.* at 1169–1170).

The evidence under Specification 2 of the Initial Charge related to the next episode, the killings at an irrigation ditch in the eastern part of the hamlet. Petitioner personally expended between 10 and 15 magazines of ammunition at the ditch and was convicted of killing not less than 20 people there (*id.* at 1170–1172).

After the incident at the ditch, petitioner and a subordinate encountered a man between 40 and 50 years of age who was dressed in the white robes of a monk. Petitioner shot the man in the head and was convicted of the premeditated murder of one male human being, as alleged in Specification 1 of the Additional Charge. Immediately thereafter, petitioner flung a Vietnamese child, about two years old, into the ditch. Petitioner fired at the child, but the witness

who described this incident did not see whether the child had been struck. Accordingly, although Specification 2 of the Additional Charge alleged the premeditated murder of a two-year-old child, the court found petitioner guilty of a lesser included offense, assault with intent to commit murder in violation of Article 134, UCMJ, 10 U.S.C. 934 (Pet. App. D, pp. 1172–1173).[1]

3. Petitioner was sentenced to confinement at hard labor for life, dismissal from the service, and forfeiture of all pay and allowances. On August 20, 1971, the reviewing authority, after a review by the staff judge advocate, approved the findings and sentence except as to the period of confinement, which was reduced to 20 years. See Article 64, UCMJ, 10 U.S.C. 864. The Army Court of Military Review affirmed the conviction and sentence after having thoroughly analyzed and rejected 31 separate assignments of error

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[1] Petitioner admitted having participated in most of the murders of which he was convicted. The major emphasis of his defense was that he lacked the requisite *mens rea* because he was acting under orders from Captain Medina, the Commander of "C" Company, to kill everyone in the village, even women and children. Captain Medina denied at trial having given this order. His testimony was corroborated by a number of witnesses, including most of the members of petitioner's platoon who testified.

The military judge properly instructed the members of the court that an order to kill unresisting Vietnamese would have been illegal. The members of the court could therefore have convicted petitioner on either of two bases: a finding that petitioner was not given such an order or, alternatively, that petitioner realized (or should have realized) the illegality of such an order. Since a court-martial conviction is in the nature of a general verdict, it cannot be ascertained which finding actually led to petitioner's conviction (see Pet. App. D. pp. 1173–1184; Pet. App. C, pp. 26–27).

(Pet. App. D; see Article 66,UCMJ, 10 U.S.C. 866). The United States Court of Military Appeals subsequently granted a petition for review with respect to three issues,[2] and on December 21, 1973, it affirmed the conviction and sentence (Pet. App. C; see Article 67, UCMJ, 10 U.S.C. 867). The Court of Military Appeals denied a petition for reconsideration on February 4, 1974.

Prior to execution of petitioner's sentence, the Secretary of the Army undertook the review required by Article 71(b) of the UCMJ, 10 U.S.C. 871(b). On April 15, 1974, the Secretary approved the findings and sentence, but in a separate clemency action he commuted the confinement portion of the sentence to 10 years. The President reviewed the case in his capacity as Commander-in-Chief of the Armed Forces and on May 3, 1974, notified the Secretary of the Army that he would take no further action in the matter. The next day, the Army executed that portion of petitioner's sentence calling for his dismissal from the service.

4. On February 11, 1974, prior to review by the Secretary of the Army, petitioner sought habeas corpus relief in the United States District Court for the

[2] The Court of Military Appeals determined that only three of petitioner's 31 allegations of error merited discussion: (1) that pretrial publicity had deprived petitioner of due process; (2) that the evidence was not sufficient to support the verdict; and (3) that the military judge gave erroneous instructions concerning the requirement of malice aforethought and the defense of compliance to orders by superiors.

Middle District of Georgia.[3] On September 25, 1974, the district court held (Pet. App. B) that petitioner was entitled to a writ of habeas corpus on four grounds: (1) prejudicial pretrial publicity had precluded a fair trial; (2) the refusal of the military judge to subpoena certain witnesses had deprived petitioner of certain of his constitutional rights; (3) the refusal of the House of Representatives to release to the defense certain testimony taken in executive session had deprived petitioner of due process; and (4) the charges failed to give petitioner fair notice of what he had to defend against and left him vulnerable to being twice placed in jeopardy for the same offenses. Accordingly, the district court ordered petitioner immediately released on bail pending appeal. The Army appealed and petitioner cross-appealed.

At the Army's request, the court of appeals granted a temporary stay of the district court's order of immediate release. The Fifth Circuit later reinstated the order granting petitioner's immediate release pending appellate review and, acting *sua sponte,* ordered an *en banc* hearing. On September 10, 1975, the court of

[3] The court immediately issued an *ex parte* order restraining respondents, the Secretary of the Army and the Commanding General at Fort Benning, from changing petitioner's place of custody or the conditions of his confinement. On February 27, 1974, the district court ordered petitioner released on bail pending disposition of his habeas petition. The court of appeals reversed the district court's orders and returned petitioner to the custody of the Army. *Calley* v. *Callaway*, 496 F. 2d 701 (C.A. 5), rehearing denied, 497 F. 2d 1384.

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appeals (by a vote of 8 to 5, with 2 judges recusing themselves), reversed the judgment of the district court and reinstated the judgment of the court-martial (Pet. App. A). The dissenting members of the court pretermitted the issue of pretrial publicity and rejected all other grounds for reversal of the conviction except for the one relating to the refusal of a congressional subcommittee to turn over testimony taken in executive session.[4]

ARGUMENT

Resolution of the issues raised by petitioner in this Court depends in large measure upon an evaluation of the evidence in the record. Since the military courts, after careful examination of the record, rejected petitioner's claims, there is no need for civilian review. As this Court stated in *Burns* v. *Wilson*, 346 U.S. 137, 144:

> [I]t is not the duty of the civil courts * * * to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in * * * applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims.

[4] Petitioner is presently under sentence but has been released on bail pursuant to court order. Thus, petitioner is sufficiently restrained to be "in custody" for purposes of habeas jurisdiction. *Jones* v. *Cunningham*, 371 U.S. 236; see also *Carafas* v. *LaVallee*, 391 U.S. 234. The Secretary of the Army has approved a parole for petitioner, to be effective immediately upon his return to military control (assuming that he is returned to military control following final disposition of this case).

See also *Schlesinger* v. *Councilman*, 420 U.S. 738, 746–748; *Parker* v. *Levy*, 417 U.S. 733, 762. Accordingly, in responding to the issues raised by petitioner, we rely substantially on the opinions of the military courts (Pet. Apps. C and D). We also rely on the Fifth Circuit's opinion (Pet. App. A), which thoroughly analyzes and correctly rejects each of petitioner's claims.

1. Relying on numerous decisions of this Court (*e.g.*, *Marshall* v. *United States*, 360 U.S. 310; *Irvin* v. *Dowd*, 366 U.S. 717; *Rideau* v. *Louisiana*, 373 U.S. 723; *Estes* v. *Texas*, 381 U.S. 532; *Sheppard* v. *Maxwell*, 384 U.S. 333), petitioner contends at some length (Pet. 6–35) that he was deprived of due process because of prejudicial pretrial publicity. He argues that the publicity surrounding his case was so virulent and pervasive that prejudice must be presumed despite assertions of impartiality by the six members of his court-martial during *voir dire*. He concomitantly suggests (Pet. 30, 34–35) that prejudicial publicity would prevent him from ever receiving a fair trial. These contentions are adequately answered in several of the opinions below (Pet App. A, pp. 7707–7718; Pet. App. C, pp. 21–23; Pet. App. D, pp. 1142–1148, 1157–1163). We add only a few comments.

This Court has made clear that a jury's exposure to pretrial publicity is not necessarily a bar to a fair trial.[5] As this Court stated recently in *Murphy* v. *Florida*, 421 U.S. 794, 800–801 n. 4:

[5] The force of petitioner's argument that exposure to publicity concerning the killings at My Lai inevitably prejudiced the jurors is diminished by the defense's "concerted effort * * * to have placed on the panel officers who had knowledge of many aspects of this case" (Pet. App. A, pp. 7714–7715).

> We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. * * * To ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.

See also *Irvin* v. *Dowd, supra,* 366 U.S. at 722–723.

The totality of the circumstances in the present case fully supports the findings below that the pretrial publicity concerning the incidents at My Lai was not so prejudicial or inflammatory as to render the members of the court incapable of reaching a fair verdict in petitioner's case. Petitioner was not tried in an atmosphere of persecution. Much of the pretrial publicity consisted of "straight news stories rather than invidious articles which would tend to arouse ill will or vindictiveness." *Beck* v. *Washington,* 369 U.S. 541, 556. Indeed, there were indications that the climate at Fort Benning, the site of the court-martial, was "somewhat favorable" to petitioner (Pet. App. D, p. 1146).

Even though the judge who presided at petitioner's court-martial allowed defense counsel full opportunity to discover "any manifest or even latent prejudice during *voir dire*" (Pet. App. D, p. 1148), no indication was developed that any of the six persons ultimately selected to serve had a preconceived notion of petitioner's guilt or innocence. As the Court of

Military Review observed (Pet. App. D, p. 1148), moreover, there were no special circumstances here requiring the military judge to disbelieve the court members' assurances of impartiality. Thus, this case is significantly unlike the situation in *Irvin* v. *Dowd, supra,* where this Court looked beyond the jurors' claims of impartiality because 8 of the 12 jurors had expressed a belief in the defendant's guilt at some point during *voir dire.*[6]

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[6] Petitioner contends (Pet. 33) that the record reveals that at least one of the jurors, Major McIntosh, was biased against him because he stated during *voir dire* that he had seen one of the potential witnesses for the prosecution on television and that the person had "seemed credible" on that occasion. But Major McIntosh also stated during *voir dire* that he had not formed a general impression of the credibility of the person in question and that if the person testified at the court-martial he would determine his credibility solely on the basis of the testimony given at the court-martial (Pet. App. A, p. 7716, n. 47). As the court of appeals noted (*id.* at 7717), moreover, the defense did not challenge Major McIntosh for cause and that fact is "'strong evidence that [petitioner] was convinced the juror [was] not biased and had not formed any opinion as to his guilt'" [quoting from *Beck* v. *Washington,* 369 U.S. 541, 558].

Although petitioner asserts (Pet. 31, n. 16) that his failure specifically to challenge each of the jurors, including Major McIntosh, for cause is insignificant in view of his "continuous" challenge to every prospective juror, that assertion is unpersuasive. Petitioner's continuous challenge proceeded from his contention that jury prejudice must be presumed because of prejudicial pretrial publicity rather than from evidence of actual and particular prejudice on the part of individual jurors. Since petitioner did specifically challenge several prospective jurors for cause, moreover, the military judge can hardly be faulted for having failed to exclude Major McIntosh on the basis of an observation which the defense apparently did not find sufficient to request that he do so.

It is also significant that the procedures followed by the military judge in this case—not only during *voir dire*, but at all other times—"assured insofar as could be done the right to a fair trial by an impartial court-martial" (Pet. App. D, p. 1145). See *Sheppard* v. *Maxwell, supra.* The ameliorative actions of the military judge are discussed in the opinions below (*e.g.*, Pet. App. D, pp. 1143–1145). Particularly noteworthy is the long period of time that elapsed between the peak of the publicity (November and December of 1969, and January of 1970) and the beginning of the trial almost a year later (November 1970). Indeed, the military judge stated that he had intentionally delayed the start of the trial "to let the effect of any pretrial publicity dissipate" (Pet. App. A, pp. 7712–7713, n. 41). Additionally, during the four months of trial the military judge "employed all possible means to insure the insulation of the court members from tainting influences" (Pet. App. D, p. 1144). It is undisputed that the court members were not exposed to any prejudicial publicity during this period.[7]

[7] Petitioner improperly relies on those cases which hold that the failure of a trial judge to take ameliorative action helps to establish a violation of due process. In those cases (*e.g.*, *Estes* v. *Texas*, *supra*; *Turner* v. *Louisiana*, 379 U.S. 466; *Sheppard* v *Maxwell*, *supra*) the trial court "participated in or actually exacerbated the tainting influences" (Pet. App. D, p. 1145). Petitioner can show no such dereliction of duty here.

Petitioner points (Pet. 22–23) to the fact that there was no military judge to take protective measures during the "critical period" from September 5, 1969, to November 25, 1969. The primary reason for this delay was that the charges against petitioner were not referred to trial until the completion of the "Article 32" investigation on November 24, 1969. It would have been improper to appoint a military judge prior to that time.

Petitioner also emphasizes (Pet. 24–25) that the military judge did not give precautionary instructions to five of the six jurors until after they had been exposed to a year of publicity concerning the case. But petitioner does not dispute the fact that the military judge gave proper instructions to all six of the persons who ultimately served as soon as they had been added to the list of prospective jurors.

Similarly, petitioner suggests (Pet. 25) that his conviction must be reversed because the military judge had no contempt power outside the courtroom to deter violations of his protective orders. It is true that one or more of the civilian witnesses disregarded the judge's order not to discuss publicly their recollections of the events in issue. But this is not a situation in which the judge "exacerbated" prejudicial influences and, in any event, the crucial question is whether any of these circumstances influenced the persons who served on the court-martial against petitioner. As the military courts and the court of appeals noted, a close examination of the *voir dire* dispels any concern with regard to the exposure of the six members of the court to the statements of witnesses who violated the judge's protective orders.

There is no merit to petitioner's claim (Pet. 25–27) that his conviction must be reversed because the military judge denied a defense request to restrain the media from publicizing statements of potential witnesses about My Lai or showing pictures of the bodies of people killed there (see Pet. App. D, pp. 1144–1145; Pet. App. A, pp. 7717–7718). There is a heavy presumption against the constitutionality of prior restraints on the media. See, *e.g.*, *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1307 (opinion of Mr. Justice Powell in chambers); *Nebraska Press Association* v. *Stuart*, No. 75–817, certiorari granted December 12, 1975 (opinion of Mr. Jus-

tice Blackmun in chambers); *United States* v. *Dickinson*, 465 F. 2d 496, 506 (C.A. 5), certiorari denied, 414 U.S. 979. In view of the severity of such an order, the military judge cannot be faulted for refusing to grant the defense request. As discussed above, moreover, the record here—especially the thorough and sensitive *voir dire*—disproves petitioner's assertions that the persons who served on the court-martial were prejudiced against him.[8]

In response to petitioner's assertion (Pet. 20) that the members of the court were influenced by certain public statements of high-ranking officials (such as the President of the United States, the Secretary of Defense and the Secretary of the Army), we rely on the opinion of the Court of Military Review (Pet. App. D, pp. 1157–1163), which concluded that the statements in question—which were not "directed to potential court members"—had no prejudicial effect (Pet. App. D, p. 1162):

> [T]heir utterance almost a year prior to trial, their overall neutral character, and the vague

[8] The issues before the Court in *Nebraska Press Association* v. *Stuart*, *supra*, No. 75–817 (certiorari granted, December 12, 1975), are not presented here. *Stuart* involves a challenge, on First Amendment grounds, to a court order restraining media coverage during a criminal trial. The issue in the present case, however, is not whether the order requested by the defense would have been constitutional, but whether the failure of the military judge—on the particular facts of this case—to issue such an order was an abuse of discretion preventing a fair trial. That factual issue, not presented in *Stuart*, has been resolved adversely to petitioner by the military courts and by the court of appeals. There is thus no reason to defer disposition of the petition in this case pending a decision in *Stuart*.

> recollection or absence of any recollection of these statements by the court members demonstrate no fair risk of the exertion of improper command influence.

In short, there is no reason to doubt the compliance of members of the court-martial with their sworn assurances of impartiality. Petitioner cannot demonstrate actual prejudice; nor can he persuasively analogize this case to cases in which prejudice has been presumed. Compare, *e.g.*, *Rideau* v. *Louisiana*, *supra* (20-minute film of defendant's confession telecast three times in a community where crime and trial took place); *Estes* v. *Texas*, *supra* (press allowed to overrun bar of the court with television equipment); *Sheppard* v. *Maxwell*, *supra* (overwhelming media demand for defendant's conviction coupled with negligent failure of trial judge to take precautionary measures to avoid contamination of trial itself); *Marshall* v. *United States*, *supra* (seven jurors learned from the newspaper during trial of defendant's prior convictions of similar offenses).

2. In response to the widespread public interest in the events at My Lai, the Chairman of the House Armed Services Committee created a special subcommittee to investigate the matter. In order to avoid prejudicing the rights of any defendant in possible criminal trials arising from the incident, however, the subcommittee announced at the outset that testimony would be taken in executive session and would not be released.

At his court-martial, petitioner requested the production of this testimony under the Jencks Act, 18 U.S.C. 3500, and *Brady* v. *Maryland*, 373 U.S. 83. Although the military judge initially declined to rule whether either the Jencks Act or *Brady* required the production of the testimony, he did suggest that the testimony might be helpful and, on three separate occasions, he issued subpoenas to the House of Representatives. The House never released the testimony (Tr. 461, 492–493, 3348).[9] Neither the defense nor the prosecution was given access to the material, nor was the material ever released to the military judge for *in camera* inspection.

Petitioner eventually moved under the Jencks Act to prevent individuals who had testified before the House subcommittee from testifying at trial. The military judge denied the motion, ruling that the Jencks Act "does not include within its framework statements or testimony given to congressional subcommittees in executive session" and that, "in light of the extraordinary volume of similar matter provided to the defense in this case," the House's refusal to disclose the testimony would not deprive petitioner of due process (Tr. 527).

Petitioner now argues (Pet. 36–59) that the House subcommittee improperly invoked its general privilege of confidentiality in refusing to furnish to the defense testimony that may have been valuable for purposes of exculpation or impeachment. He also argues (Pet. 37) that his inability to obtain the requested materials was a deprivation of constitutional proportions. These claims were thoroughly examined below and were properly rejected (see Pet. App. D, pp. 1184–1195; Pet. App. A, pp. 7725–7733).

[9] "Tr." refers to the transcript of the court-martial.

a. It is not necessary for this Court to consider the propriety of Congress' refusal to turn over the testimony in question. As the court of appeals correctly observed," [t]he issue before us is not the legality of this [congressional] action, but rather the effect of denying the testimony to the defense" (Pet. App. A, p. 7727 n. 60).[10] Since the military courts have decided this factual issue adversely to petitioner, civilian review is not warranted.

The record in this case amply supports the conclusion of the military courts that the refusal of the congressional subcommittee to release the materials in question did not significantly affect petitioner's trial. As the Court of Military Review concluded (Pet. App. D, p. 1195), folowing an exhaustive examination of the record (Pet. App. D, pp. 1163–1173):

> The House Investigating Subcommittee conducted only one of a number of investigations into My Lai. The defense was provided with volumes of pretrial statements given by the Government witnesses during the many investi-

[10] Petitioner asks this Court to extend its holding in *United States* v. *Nixon*, 418 U.S. 683, involving a claim of presidential privilege with respect to materials subpoenaed for use in a grand jury investigation, to the instant case. But the decision in *Nixon*, which involves materials already in the possession of the Executive Branch, provides no guidance so far as the only issue presented here is concerned—that is, the effect of nondisclosure on petitioner's trial.

> gations conducted within the Army; and those witnesses who testified both before the investigating subcommittee and at trial did not present the heart of the government's case.[11]

The court of appeals similarly concluded (Pet. App. A, pp. 7729–7730) that petitioner had failed "to offer even a reasonable possibility that something helpful to the defense was adduced before the [House] Subcommittee that was not already developed in the thousands of pages of testimony, statements and documents already afforded the defense."

Thus, even if a case might be imagined in which congressional insistence upon maintaining the confidentiality of materials developed in executive session and in the course of legitimate legislative activities would create a situation so fundamentally unfair as to foreclose prosecution of a criminal charge, this is clearly not such a case. The massive amount of materials made available to the defense and the absence of any indication that the withheld materials would have affected the outcome of the trial provided a firm basis for the court's conclusion that the materials at issue

[11] Petitioner contends (Pet. 44–45) that two of these witnesses, Medina and Thompson, did present the heart of the government's case. The Court of Military Review accurately concluded (Pet. App. D, p. 1195), however, that "[t]he key Government witnesses were Sledge, Meadlo, Conti, Dursi and Turner." Petitioner was provided with other pretrial statements of every prosecution witness (including Medina and Thompson) who testified before the subcommittee (Pet. App. A, p. 7729).

would have been merely cumulative of other materials possessed by the defense.[12]

b. Petitioner's reliance (Pet. 43–50) on *Brady* v. *Maryland, supra,* is misplaced. In *Moore* v. *Illinois,* 408 U.S. 786, 794–795, this Court enunciated the test to be used in evaluating claims under *Brady* (emphasis added):

> The heart of the holding in *Brady* is the *prosecution's* suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

But the prosecution in the present case was not guilty of having suppressed evidence: indeed, the subcommittee's refusal to release the transcripts meant that they were equally unavailable to the prosecution and the defense. Petitioner provides no persuasive

[12] Petitioner argues (Pet. 42) that this conclusion involves a kind of "Catch 22" because he cannot prove the value of the congressional transcripts without seeing them. Certainly, petitioner cannot be required to make a precise showing of what the transcripts would reflect. But the prosecution labors under the same disability with respect to demonstrating that nothing of important exculpatory value exists in the congressional transcripts. In the circumstances of this case, it is surely reasonable to place the burden of coming forward in this particular matter on the defense, and the absence of even a minimal showing that the transcripts would have been helpful to the defense is fatal to petitioner's constitutional claim. See *Milton* v. *Wainwright*, 407 U.S. 371, 377–378; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 265–266 (Powell, J., concurring).

support for his contention that *Brady* was intended to apply to "congressional" suppression as well as "prosecutorial" suppression. In fact, the decisions of this Court indicate the contrary. See *Wardius* v. *Oregon*, 412 U.S. 470, 473–474; *United States* v. *Augenblick*, 393 U.S. 348; *Brady* v. *Maryland*, *supra*, 373 U.S. at 87. Although Article 46 of the UCMJ, 10 U.S.C. 846, guarantees defendants equal access with the prosecution to discoverable materials, that mandate—which, in our view, is the most that due process requires—was strictly enforced here.

c. Neither is there any merit to petitioner's assertion (Pet. 51–59) that the denial of his Jencks Act motion was an error of constitutional magnitude. The military courts correctly concluded (*e.g.*, Pet. App. D, pp. 1190–1194) that the disclosure requirements of that Act were not intended to apply to the files and records of Congress itself.[13] In any event, this Court noted in *United States* v. *Augenblick*, *supra*, that infractions of the Jencks Act do not normally rise to the level of a constitutional violation.[14] As discussed

[13] The court of appeals did not reach this issue (Pet. App. D, p. 7732 n. 65). Contrary to petitioner's suggestions (Pet. 52, n. 3), the ruling of another military judge that the Jencks Act does apply to testimony before a congressional committee is hardly an indication that the military judge here acted "arbitrarily." Indeed, the only other court to address that issue specifically held that the Jencks Act is not applicable to such materials. *United States* v. *Ehrlichman*, 389 F. Supp. 95, 97 (D.D.C.).

[14] It reached that conclusion in *Augenblick*, even though the denial of discovery in that case may have "seriously impeded [the defendant's] right to a fair trial" (393 U.S. at 356). It clearly follows from that conclusion that there was no constitutional violation here (see Pet. 52–53).

above, petitioner has not made a reasonable showing that the nonavailability of the documents in question prejudiced his defense (see Pet. App. A, p. 7733; Pet. App. D, pp. 1194–1195).

3. Petitioner further contends (Pet. 60–66) that his Sixth Amendment rights to confrontation and compulsory process were violated by the refusal of the military judge to issue subpoenas to the Secretary of Defense, the Secretary of the Army, and the Army's Chief of Staff requiring them to appear and testify at a pretrial hearing. This issue was fully and fairly considered by the military courts (*e.g.*, Pet. App. D, pp. 1151–1157, 1189), which concluded that there was no factual basis for petitioner's allegations (see also Pet. App. A, pp. 7718–7724).

a. Petitioner sought subpoenas for these three witnesses in an attempt to show that "command influence" had permeated the processing of the charges against him. See Article 37, UCMJ, 10 U.S.C. 837. Initially, the sole support for petitioner's claim was a newspaper article. Nevertheless, the military judge required the prosecution to bear the burden of coming forward with evidence to rebut the allegation of command influence.

At a hearing on this issue, the government adduced testimony from each officer at Fort Benning who was involved in the processing of the charges against petitioner. All of these officers testified "that they did not receive, directly or indirectly, any instructions as to an appropriate disposition of the case" (Pet. App. D,

p. 1154). In light of this evidence, the military judge ruled that the defense had failed to establish a need for issuance of the subpoenas, but that he would issue the subpoenas if defense counsel could demonstrate such a need. The defense never made a colorable showing that the charges against petitioner were the product of command influence.[15]

The Sixth Amendment does not confer an absolute right to compulsory process. The issuance of subpoenas in the military is governed by paragraph 115a of the *Manual for Courts-Martial, United States* (Rev. ed. 1969), which makes materiality and relevance important factors in the discretionary decision to issue a subpoena. Rule 17(b) of the Federal Rules of Criminal Procedure similarly vests broad discretion in federal district courts to grant subpoenas on behalf of indigent defendants, at government expense, where it is claimed that "the presence of the witness is necessary to an adequate defense." The safeguards

[15] The opinion of the Court of Military Review (Pet. App. D, p. 1155) and the majority and dissenting opinions in the court of appeals (Pet. App. A, pp. 7724, 7736) all noted the "lack of defense efforts to litigate [this] issue" (Pet. App. D, p. 1155). At the trial, defense counsel volunteered to interview the witnesses and promised that he would return to the court with an offer of proof if it appeared that the witnesses had important testimony to present. Indeed, defense counsel twice asked for and received a specific order from the military judge authorizing interviews with all three witnesses. The defense failed, however, to offer to the military judge any further evidence on this subject. Petitioner's suggestion (Pet. 61–62) that the military judge's initial ruling was irrevocable has no support in the record (see Pet. App. A, p. 7724 n. 58; Tr. 272–274; 304; 424–425).

contained in these provisions are all that the Sixth Amendment requires. See Pet. App. A, p. 7723.[16]

The military judge's refusal to issue the requested subpoenas was not an abuse of discretion. In holding to the contrary, the district court did not give sufficient deference to the findings of the military courts. The court of appeals properly observed in this regard (Pet. App. A, p. 7723):

> The military judge conducted an extensive hearing on [petitioner's] contentions. He found there was no evidence to support the accusations of command influence. The defense was then forced to take the position that, although no one at Fort Benning was pressured into bringing charges as a result of command influence, General Westmoreland, the Secretary of Defense and the Secretary of the Army might nonetheless state, if called as witnesses, that they had in fact wielded such pressure. We hold that the conclusions of the military judge, which were fully and fairly considered and reaffirmed by the Court of Military Review, amply support the decision not to subpoena the witnesses in question.

[16] As Mr. Justice (then Circuit Judge) Blackmun stated in *Slawek* v. *United States*, 413 F. 2d 937, 960 (C.A. 8):

"[A] rich defendant may have the right to waste his money on unnecessary and foolish trial steps, but that does not, in the name of necessary constitutional equality, give the indigent the right to squander government funds merely for the asking. Slawek overlooks the fact that compulsory process under Rule 17(b) is a matter within the area of the trial court's discretion."

In military prosecutions, the government bears all witness costs. See *Manual for Courts Martial, United States*, paragraph 115d (Rev. ed. 1969).

b. Petitioner similarly claims (Pet. 66–67) that the military judge's refusal to issue a subpoena for a potential defense witness, John Tunstal, violated his Sixth Amendment rights. According to petitioner, Tunstal would have impeached a prosecution witness, Dennis Conti, by testifying that petitioner had reprimanded Conti for sexually assaulting a Vietnamese woman prior to the incident at My Lai. This testimony was claimed to support petitioner's allegation that Conti nurtured hostility toward him which he vented in his trial testimony. The court of appeals unanimously rejected this claim (Pet. App. A, pp. 7724–7725, 7737).[17] As the court observed, petitioner failed to make any showing that Tunstal's anticipated testimony would not have been merely cumulative of other testimony to the same effect (Pet. App. A, p. 7725):

> [U]nder questioning from the military judge, defense counsel acknowledged that this alleged incident [the sexual assault by Conti] occurred prior to My Lai, that Tunstal's previous statements had never indicated his knowledge of any such incident, that Tunstal had not even indicated whether Calley was present at or aware of the assault, and that Tunstal did not even indicate that the incident was reported. Thus, the import of Tunstal's testimony was only that he was aware of an assault by Conti on a Vietnamese woman prior to My Lai. That

[17] On direct appeal, the military courts rejected petitioner's argument as not meriting discussion.

> Conti had engaged in sexual misconduct was well established at trial.[18]

4. Petitioner's final contention (Pet. 68–74) is that the Charges, Specifications and Bill of Particulars did not give him adequate notice of the charges against him or protect him from subsequently again being placed in jeopardy for the same offenses. In support of his claim of inadequate notice, petitioner argues that he was convicted of killing several groups of Vietnamese at the ditch, that he was not present when certain killings at the ditch took place, and that preparing a defense against all of the separate offenses with which he had been charged was impossible because of the confused nature of the testimony. In support of his double jeopardy claim, he argues that he could have been (or may later be) convicted of killing the same people twice. As an example, he notes that the old man and the small child, whose murders were alleged in the Additional Charge, may have been among the bodies in the ditch referred to in Specification 2 of the Initial Charge. These claims are answered in the opinion of the court of appeals (Pet. App. A, pp. 7733–7734).[19]

With respect to both the notice and double jeopardy issues raised by petitioner, "[t]he Constitution

[18] The military judge stated that he would reconsider the subpoena request if the defense could show that Tunstal's testimony would somehow connect petitioner with the incident involving Conti and the Vietnamese woman. But "[d]espite this opportunity, no such connection was ever subsequently demonstrated" (Pet. App. A, p. 7725).

[19] The court of appeals unanimously rejected these contentions (Pet. App. A, p. 7737).

requires that criminal charges be sufficiently specific (1) to apprise the defendant of what he must be prepared to meet at trial, and (2) to enable the defendant to show with accuracy the extent to which he may plead former acquittal or conviction in other proceedings brought against him for a similar offense" (Pet. App. A, p. 7734). The charges here met these requirements. As set forth in the Specifications and refined by the Bill of Particulars, the charges included the chronological sequence and the geographical setting of the separate events—the killings at the trial (in the southern portion of the hamlet), the killings at the ditch (in the eastern portion), and, finally, the murders of the monk and the child. The military judge's instructions at the close of evidence, which were "detailed and thorough" (Pet. App. A, p. 7734), required the members of the court to pay close attention to these chronological and geographic distinctions. Moreover, the verdict, which modified three of the four Specifications, reflected substantial fact-finding discrimination. As to the "fair notice" claim, the court of appeals noted (Pet. App. A, p. 7734):

> [Petitioner] did not deny his involvement and participation in the mass killings at the ditch and the trial. It is difficult to understand how a defendant is deprived of fair notice of the charges against him when he confirms that the alleged incidents happened and that he participated in them.

Petitioner's argument that the charges and testimony were so confused that he may have been convicted of killing the same people twice (or of murders

he did not commit) are, in large part, an attack on the sufficiency of the evidence. That issue was resolved against petitioner by the Court of Military Review following an exhaustive study of the record (Pet. App. D, pp. 1163–1173; see also *id.* at 1173–1184).[20] Further review of that issue is not warranted.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[20] Even if there is merit to petitioner's claim that his conviction under Specification 2 of the Initial Charge (the murder of "not less than 20 persons") may have included the killing of the old man and the child, the proper remedy would simply be to alter the verdict under that Specification to encompass the murder of "not less than 18 persons." Petitioner—who has been released on bail and has been granted parole in the event his conviction is affirmed—is hardly in a position to suggest that such a modification in the verdict would affect his punishment.

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